

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

V.L. JOHNSON, d/b/a V.L. JOHNSON)
LUMBER CO.)
)
 Appellant,)

vs.

No. 21998

CHICAGO, MILWAUKEE, ST. PAUL &)
PACIFIC RAILROAD CO.,)
)
 Appellee,)

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BRIEF OF APPELLANT
- - - - -

Appeal from the United States Court for
the District of Idaho, Northern Division.

HONORABLE RAY McNICHOLS

District Judge
- - - - -

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JURISDICTIONAL STATEMENT

This action was filed by appellant, as plaintiff, in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Benewah (Rec. p. 12) Service was obtained by summons issued out of that court, on September 29, 1966. (Rec. p. 9)

Respondent, as defendant, filed its petition for removal to the United States District Court for the District of Idaho, Northern Division, on October 17, 1966 (Rec. p. 6 - 8), together with its bond for removal (Rec. p. 15), notice of filing thereof (Rec. p. 19) and affidavit of mailing (Rec. p. 17).

The basis of original jurisdiction of the District Court and of the petition for removal was diversity of citizenship under Title 28, United States Code, § 1332.

Plaintiff did not contest the removal.

Plaintiff is a resident of the State of Idaho (Rec. p. 10), and under 28 U.S.C. §1332 (c) defendant is a citizen of the State of Wisconsin, by reason of its incorporation under the laws of that state (Rec. p. 7). The amount in controversy in this action exceeds \$10,000, exclusive of interest and costs, being \$30,500 under plaintiff's first and second causes of action and \$25,500 under plaintiff's third cause of action. (Rec. p. 10 - 14)

Removal was sought and obtained under Title 28 United States Code § 1441 (a), the case being one of which the United States District Court for the District of Idaho,

Northern Division, had original jurisdiction, as aforesaid, under 28 U.S.C. §1332.

The District Court's order of involuntary dismissal having been entered with prejudice, the decision appealed from herein was a final decision (Rec. p. 79). Accordingly, this court has jurisdiction of the appeal under the provisions of 28 United States Code §1291.

STATEMENT OF THE CASE

This is an action for damages sought by the plaintiff, V. L. Johnson, from the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, on three alternative claims, each of them based on defendant's failure to provide freight service from plaintiff's sawmill at Elk River, Idaho in violation of its duty as a common carrier under common law and under Federal and Idaho statutes. (Rec. p. 10-14)

From 1963 through 1966 plaintiff was the owner and operator of a sawmill at Elk River, Idaho. During this period he shipped substantial quantities of lumber in interstate commerce over defendant's railroad line. All of his production except ten or eleven percent was transported in this manner to markets outside the State of Idaho.

(Tr. p. 3, l. 18 - p. 4, l. 6)

Elk River is located twenty miles from the nearest paved road and fifty miles from the nearest major highway. Defendant is the only rail carrier serving Elk River and the only common carrier hauling lumber from Elk River.

(Tr. p. 4, l. 24 - p. 6, l. 11) Defendant's railroad line runs from Elk River -- the southern terminus of the line -- to St. Maries, Idaho, where it connects with defendant's main line. (Tr. p. 5, l. 18 - 24)

Until 1966, this line passed through a tunnel, known as the Neva Tunnel, at a point between Elk River and

the next station to the north -- Bovill, Idaho. In April, 1966, a partial cave-in or blockage of this tunnel caused the temporary suspension of rail service in and out of Elk River. This blockage was cleared within a few days and service was restored. (Tr. p. 69, l. 2 - 19) On about May 12, after an inspection of the tunnel, service was discontinued without any prior notice to plaintiff, and was not restored until about October 17, 1966, subsequent to the filing of this action. (Tr. p. 70, l. 19 - p. 75, l. 16; P. Ex. 12)

No order of the Interstate Commerce Commission or the Idaho Public Utilities Commission was obtained at any time authorizing such suspension of service or declaring an embargo upon shipments in or out of Elk River. (Tr. p. 114, l. 4-19)

As will be more fully developed in a subsequent portion of this brief, maintenance of the tunnel had, for several years, been on a temporary or "stop-gap" basis. (Tr. p. 51, l. 21 - p.52, l. 23; Tr. P. 140, l. 17- p.141, l.3) Inspections of the tunnel in 1964 showed it to be in bad condition and deteriorating. (Tr. p. 53, l. 15 - p.54, l.22; p. 55, l. 1 - l. 19) The necessity for substantial work on the tunnel in 1964 was recognized by defendant, but the work was not performed in 1964 nor in 1965. (DAP 1-6, Rec. 49-50; Tr. p. 50, l. 16 - p. 51, l. 5.)

During 1955 and 1956, defendant was negotiating with the Idaho Department of Highways in an effort to persuade the Highway Department to bear the major part of the

cost of "daylighting" the tunnel, with the resulting cut to be used for the relocation of state highway in that area as well as for the railroad. (P.Ex. 5, 6; Tr. p.44, l. 19 - p. 45, l.7.)

The joint project continued under "rather desultory consideration" (P. Ex. 11) for several years, and in December, 1965, the State proposed further negotiations, (Tr. p. 59, l. 4 - 24) but defendant did not respond to the State's overtures until after the cave-in of the tunnel. (P. Ex. 15; Tr. p. 86, l. 9 - 17.)

Between defendant's condemnation of the tunnel on May 12, 1966, and solicitation of bids on July 22, 1966, defendant studied the economics of the situation and negotiated with the Idaho Department of Highways, (Tr. p. 93, l. 5 - 17; P. Ex. 15.) resulting in an agreement under the terms of which the State ultimately paid about \$69,000 of the approximately \$180,000 total cost of the daylighting project. (Tr. p. 94, l. 11 - 24.)

Pursuant to solicitation of bids in late July, defendant entered into a contract dated August 17, 1966, with Morrison-Knudsen Company for the replacing of the tunnel with a cut. The contractor commenced work about August 29 and the job was completed about October 14. (Tr. p. 93, l. 10 - p. 94, l. 2)

At the time of the termination of service, on May 12, plaintiff had one car of lumber loaded and awaiting shipment from Elk River. (Tr. p. 6, l. 22 - p. 7, l. 21) The bill of lading on this car was accepted by defendant's

agent in Plummer, Idaho, who had apparently not been advised that service in and out of Elk River was suspended. (Tr. p. 152, l. 25 - p. 153, l. 11) Thereafter defendant unloaded this car and trucked the lumber to Bovill for reloading and shipment on its line from that point. (Tr. p. 154, l.22 - p. 155, l. 1) Plaintiff's later requests for further service on this basis were refused. (Tr. p. 167, l. 4 - 18)

Shortly after the termination of service, plaintiff inquired about the probable duration of the suspension but defendant would not or could not tell him. (Tr. p. 134, l. 15 - p. 136, l.6)

In response to further inquiries, he was advised that service would be restored about July 15. (Tr. p. 9, l. 4 - 16) When this date passed without action, he was unable to obtain any reliable information about the matter until September 1 when his attorneys, in response to a letter written by them August 9, received a letter from defendant dated August 30, stating that the service was expected to be restored by the middle of October. (P. Ex. 2)

During the time the service was suspended -- which embraced almost the entire operating season for plaintiff at Elk River -- plaintiff was forced to curtail his lumber production drastically. (Tr. p. 4, l. 7 - 13; p. 10, l. 16 - 23) He hauled a few carloads of lumber by truck to Bovill for rail shipment from that point, but this method of operation was not economically feasible for several reasons: plaintiff did not have the proper truck for the job; there were no loading facilities at Bovill, and plaintiff did not

have a loader which he could leave in Bovill; in addition to hauling the lumber and the double loading, plaintiff had to transport his lift truck back and forth between Elk River and Bovill -- nearly 20 miles each way -- with each load of lumber. (Tr. p. 10, l. 24 - p. 11, l. 17) Defendant was requested to provide temporary alternative service to plaintiff and the only other carload shipper in Elk River, in the form of truck service to Bovill or provision of loading facilities or both. (Tr. p. 10, l. 3 - 15; p. 167, l. 11 - 18) Defendant refused, however, on the ground that I. C. C. regulations prohibited any such service. (Tr. p. 167, l. 19 - p. 168, l. 1; P. Ex. 3)

Plaintiff also shipped a small amount of lumber by truck to consumers in Denver, but the increased transportation cost and lower price in that market made such operations unprofitable. (Tr. p. 11, l. 18 - 25) Plaintiff was unable to arrange trucking to his regular customers in the East and Midwest at any figure. (Tr. p. 27, l. 9 - p. 29, l. 5)

In May of 1966, when the service was terminated, and for several weeks thereafter, the price of lumber of the type and species produced by plaintiff was at or near record levels. By October 15, when service was restored, the price had fallen sharply and was approaching record lows. (Tr. p. 176, l. 8 - p. 177, l. 23) Moreover, by this date the operating season was almost at an end. (Tr. p. 19, l. 2-14)

As a direct result of plaintiff's greatly reduced sales and increased transportation costs, which were caused by the suspension of freight service by defendant, plaintiff's

operations in 1966 resulted in an adjusted net loss of \$21,210.46 (P. Ex. 20; Tr. p. 161, l. 8 - p. 162, l. 3) compared to net profit in 1965 of \$5,346.80 (P. Ex. 19).

During 1966, due to a better market, better facilities, and higher opening inventory, plaintiff had reason to anticipate a more profitable year than in 1965, but for his inability to ship his lumber. (Tr. p. 162, l. 4 - 27.)

By its answer to plaintiff's complaint, defendant admitted that "on or about May 13, 1966, a tunnel caved in on the railroad line of defendant between Bovill, Idaho and Elk River, Idaho, resulting in the temporary suspension of rail service to and from Elk River, Idaho." The answer generally denied the other allegations of the complaint, except as to residence, plaintiff's business, and his utilization of the railroad's service prior to May 13, 1966. (Rec. p. 26 - 28) As an affirmative defense, defendant also alleged that the cave-in "was not caused by any act, omission or negligence of the defendant, but was proximately caused by an act of God."

At the close of plaintiff's case, the defendant moved for an involuntary dismissal. After hearing arguments of counsel, the trial court granted defendant's motion, making the following observations:

"As I see the posture of the case, there are three principal issues. First, is the matter of negligence on the part of the plaintiff in the maintenance of the Neva tunnel and whether or not the necessity for the closing of the tunnel was proximately caused by any

such negligence.

"Secondly, assuming maintenance negligence was not the cause of the closing and that the defendant was not liable on this reason, did the defendant proceed reasonably to reinstate the service. Or failing to proceed, was the defendant liable to the plaintiff for damages and I am sure that they had the obligation once the tunnel was closed to act reasonably and properly to reinstate the service as soon as feasible.

"The third issue is has the plaintiff proved damages with sufficient specificity to entitle the plaintiff to have that issue to go to the jury.

"On the first issue I find that the closing of the tunnel is unquestionably shown to have been caused by an unusual massive movement of earth and not through negligent maintenance of the structure. I feel as a matter of law reasonable minds would not differ on this question and on this issue I should remove the issue from the jury's consideration.

"On the second issue the evidence is that there were three possible methods of reopening the tunnel -- wooden shoring, cement shoring and open cutting. Each of these would cause a considerable lapse of time in each instance in excess of three months. Cement or open cutting was far preferable. These would take some five months.

"I feel as a matter of law that reasonable minds

could not differ and that the railroad acted reasonably in the procedure followed to reinstate the rail service. This issue too should be removed from jury consideration.

"Assuming arguendo that I may be in error in either of the first two determinations, there is still the question of damages. Damages must be proved by the plaintiff with sufficient certainty that a jury can set the damages by some reasonable measure and not have to resort to speculation or conjecture.

"Here the only evidence is that in 1965 in operating the sawmill plaintiff made some \$5,000 profit on his mill operation, and in 1966 he lost \$21,000. He states that the loss was due solely to the impossibility of shipping. He shows by testimony through an expert that the market was good in May of 1966 and bad by October, with a constant falling off. There was no showing of the prior year's profit, that is prior to 1965 to show a pattern. No factors such as carry-over of inventory are shown. No breakdown of profits by carloads and the numbers of cars not shipped is offered. Such evidence should at least be reasonably within the ability of the party to show it, and if they do not the indication is, of course, that evidence would be unfavorable to the plaintiff.

"In order to arrive at a judgment in this matter the jury would, in my opinion, have to speculate to bring in a damage verdict. The evidence is not sufficient and the plaintiff has failed in his burden of proving damages with sufficient certainty.

"The defendant's motion of involuntary dismissal is granted." (Tr. p. 182, l. 10 - p. 184, l. 22)

Plaintiff immediatly moved to reopen for the purpose of presenting additional evidence on the issue of damages. This motion was denied by the trial court without comment. (Tr. p. 185)

On this appeal, plaintiff respectfully contends that the trial court misinterpreted the law applicable to the obligations of common carriers to shippers, basing its decision on a finding that defendant, as a matter of law, was conclusively shown to be free of negligence. Moreover plaintiff contends that the court erred in its factual determinations also, for there was ample evidence from which the jury might reasonably have found defendant guilty of negligence if that were the issue.

Plaintiff further contends that the trial court erred in finding no evidence upon which the jury could predicate an award of damages, for we submit that the evidence on this issue met fully the applicable standards.

Finally, if the evidence on the issue of damages was insufficient, plaintiff contends that the trial court should have granted the motion to reopen in order to submit further evidence on this issue.

SPECIFICATION OF ERRORS

The trial court erred in granting defendant's motion for involuntary dismissal.

The trial court erred in holding that defendant's liability for failure to provide service depended on whether or not the necessity for the closing of the tunnel was proximately caused by defendant's negligence.

The trial court erred in holding, as a matter of law, that the closing of the tunnel was unquestionably not the result of defendant's negligence.

The trial court erred in holding, as a matter of law, that the defendant acted reasonably with respect to reinstatement of the service.

The trial court erred in holding, as a matter of law, that there was not sufficient evidence to permit the jury to award any damages.

The trial court erred in denying plaintiff's motion to reopen for the purpose of submitting additional evidence which the court deemed essential to recovery.

ARGUMENT OF THE CASE

Summary of Argument

Plaintiff sued defendant to recover the substantial damages which he sustained as a result of defendant's refusal to accept, carry and deliver the product of his sawmill. At the close of plaintiff's case, the trial court granted defendant's motion for involuntary dismissal, primarily on the ground that no negligence on the part of the railroad had been shown.

In so doing, we believe the trial court erred by holding defendant to an improper standard of care by disregarding the true nature and extent of the obligations which defendant owed to plaintiff, and by failing to recognize that, judged even by the usual standard of the reasonable man, the jury would have been justified in finding defendant guilty of negligence.

As a common carrier, defendant owed plaintiff a duty to receive, carry and deliver his lumber in accordance with its published tariffs. But from May 13 to October 17, 1966 defendant refused to discharge this duty to plaintiff, even though its tariffs remained in effect without change throughout this period.

The evidence introduced in the course of plaintiff's case in chief showed that the reason for defendant's failure to serve was because defendant had closed a tunnel on its line between Elk River -- where plaintiff's mill is located --

and Bovill, some twenty miles distant. Defendant's line was the only railroad in or out of Elk River, an isolated town which is twenty miles from the nearest paved road.

Defendant closed the tunnel in April after a cave-in partially blocked it, but it was re-opened in a few days. On May 12, after an inspection which disclosed that the tunnel lining was deteriorating rapidly, defendant closed it again. The trial court found that the closing was "unquestionably shown to have been caused by an unusual massive movement of earth and not through negligent maintenance of the structure." There was ample evidence, however, that defendant had ignored the recommendations of its own engineers with respect to permanent improvement of the tunnel and had failed to perform even the annual maintenance work recognized by its own employees as necessary. Moreover, there was evidence from which the jury might have found that the "unusual massive movement of earth" was nothing more than the usual and anticipated action of natural forces upon a structure which had been permitted to deteriorate seriously.

Certainly, the evidence did not establish, as a matter of law, that defendant's failure to serve resulted from an act of God or from any other legally sufficient excuse.

Even if it were assumed that defendant proved, beyond reasonable dispute, that its failure to provide service was due to impossibility, resulting from circumstances which it could not have anticipated and which were completely beyond its control, we contend that involuntary dismissal

and Bovill, some twenty miles distant. Defendant's line was the only railroad in or out of Elk River, an isolated town which is twenty miles from the nearest paved road.

Defendant closed the tunnel in April after a cave-in partially blocked it, but it was re-opened in a few days. On May 12, after an inspection which disclosed that the tunnel lining was deteriorating rapidly, defendant closed it again. The trial court found that the closing was "unquestionably shown to have been caused by an unusual massive movement of earth and not through negligent maintenance of the structure." There was ample evidence, however, that defendant had ignored the recommendations of its own engineers with respect to permanent improvement of the tunnel and had failed to perform even the annual maintenance work recognized by its own employees as necessary. Moreover, there was evidence from which the jury might have found that the "unusual massive movement of earth" was nothing more than the usual and anticipated action of natural forces upon a structure which had been permitted to deteriorate seriously.

Certainly, the evidence did not establish, as a matter of law, that defendant's failure to serve resulted from an act of God or from any other legally sufficient excuse.

Even if it were assumed that defendant proved, beyond reasonable dispute, that its failure to provide service was due to impossibility, resulting from circumstances which it could not have anticipated and which were completely beyond its control, we contend that involuntary dismissal

should not have been granted. For there was uncontradicted evidence from which the jury might reasonably have found that defendant failed to discharge its duty to plaintiff and the public in a number of ways:

(a) By failing to make permanent improvements to the tunnel as recommended by its own engineers, at a time when this could have been done without disrupting freight service; (b) By failing to plan in advance for the daylighting or cement lining of the tunnel, which it knew would be required, as a result of which the duration of the suspension was greatly extended; (c) By deferring the letting of a contract for the daylighting job until negotiations with the State of Idaho were concluded; (d) By failing to provide plaintiff with alternative service, either by hauling his lumber by truck from Elr River to Bovill or, at the very least, by providing loading facilities and equipment at Bovill; and (e) By misinforming and failing to inform plaintiff as to the probable duration of the suspension.

We contend that defendant, as a common carrier, was bound to a high degree of diligence and care and that the jury might well have found that it failed to discharge this duty in a number of ways, all of which subjected the plaintiff to serious loss.

Defendant may well have proved that it satisfied the standards of a reasonably prudent businessman -- though not as a matter of law. Its actions were consistent with its economic self-interest; by delaying the repair of the tunnel and reinstatement of service until the State of Idaho had been

persuaded to share in the cost, defendant saved itself \$69,000. Unfortunately, however, it caused plaintiff a \$30,000 loss by doing so. But whether or not defendant was guilty of ordinary negligence, there is no basis for doubt that defendant's conduct fell far short of the utmost good faith and fairness required of common carriers.

We contend also that the trial court erred in holding that plaintiff failed to prove sufficient evidence of his loss from which the jury could reasonably have awarded any damages. Plaintiff proved his receipts, expenditures, inventories, profit, etc. in 1965 and 1966. The proof showed that he earned a \$5,000-plus profit in 1965 and suffered a \$21,000 loss in 1966, even though market conditions in 1966 were better than in 1965 and even though he was in a position -- by reason of better facilities and larger inventory -- to increase his production in 1966 over 1965, but for his inability to ship his product. Plaintiff testified that the drastic reduction in his gross receipts and net earnings was due solely to this cause, and defendant offered no evidence whatever to the contrary.

Finally we contend that if, indeed, plaintiff had not offered sufficient evidence to justify any damage award, the motion to re-open for the purpose of submitting additional evidence on this issue should have been granted. The motion was made immediately after the court's ruling; it would have involved no delay or inconvenience for the court or counsel for defendant; no surprise was involved, of course, and defendant would certainly not have been prejudiced.

For the foregoing reasons and others, set forth and developed more fully in the following argument, the judgment of involuntary dismissal should be set aside and a new trial ordered.

ARGUMENT OF THE CASE

Proposition One -- THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL.

At the close of plaintiff's affirmative case, counsel for defendant moved for dismissal, upon grounds which, if stated, do not appear in the record. After hearing arguments the trial court granted the motion and entered its order for involuntary dismissal, with prejudice, based on the court's conclusion "that the plaintiff had failed to prove his right to recover from defendant as a matter of law...."

In so doing, we respectfully submit that the trial court misconstrued the applicable law and misinterpreted the evidence, in a number of respects, as we shall attempt to show in the following argument.

On a motion for involuntary dismissal at the close of plaintiff's case, or a motion for directed verdict, the motion should be granted only when reasonable men, in fair and impartial exercise of their judgment, could reach but one conclusion.

A motion for involuntary dismissal -- or, more appropriately, a motion for directed verdict, in a jury case -- may be granted only when there is no evidence which, if believed, would authorize a verdict against the moving party. Turner v. Atlantic Coast Line R. Co., (C.A. Ga., 1961) 292 F. 2d 586. Or as another Court of Appeals has stated it, only when all the evidence is on one side or so overwhelmingly on one side as to

leave no doubt what the fact is. Wray M. Scott Co. v. Daigle, (C.A. Neb., 1962) 309 F. 2d 105. Unless the trial judge could properly determine that no reasonable man could reach a verdict in plaintiff's favor, the judge is bound to submit the question to the jury. Muldow v. Daly, (D.C. App., 1964) 329 F. 2d 886.

A. The plaintiff is entitled to all reasonable inferences from the evidence.

As this Court stated in Kingston v. McGrath, (CA, Idaho 1956) 232 F. 2d 495, 54 ALR 2d 267:

"Upon appeal from a judgment of dismissal entered upon the close of a plaintiff's case-in-chief, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the claim or cause of action asserted. Gunning v. Cooley, 1930, 281 US 90, 94, 50 S Ct 231, 74 L ed 720; Schnee v. Southern Pacific Co., 9 Cir, 1951, 186 F2d 745, 746; Graham v. Atchison, T. & S.F. Ry. Co., 9 Cir, 1949, 176 F2d 819, 823; McAlinden v. St. Maries Hospital Ass'n, 1916, 28 Idaho 657, 666, 156 P 115, 117; Black v. City of Lewiston, 1887, 2 Idaho 276, 281, 13 P. 80, 82."

B. Issues that depend on credibility of witnesses or weight of evidence are for the jury.

The Supreme Court observed in Gunning v. Cooley, supra, that:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury.... Where uncertainty as to the existence of negli-

gence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." 281 US at 94, 50 S Ct at 233; quoted by this Court in Kingston v. McGrath, supra.

In the Kingston case, this Court also held:

"As said in Wilkerson v. McCarthy, 1949, 336 US 53, 57, 69 S Ct 413, 415, 93 L ed 497: 'It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case. . . .'"

Applying these well-recognized general principles to the circumstances of this case and the evidence presented, we submit that the Court will readily see that reasonable minds might well have differed from the trial court on the issue of defendant's liability and that the evidence presented, with reasonable inferences therefrom favorable to plaintiff, would have supported a verdict in favor of plaintiff for the full amount of his claim.

II. Defendant, as a common carrier, owed a duty to plaintiff to furnish the transportation services which it offered by its tariffs to perform.

We are reluctant to restate, in some detail, what we believe to be rather obvious hornbook law. However, since the trial court's remarks upon granting defendant's motion for involuntary dismissal seem to indicate that the court regarded this

as an ordinary negligence case, we feel it is incumbent upon us to explore the obligations of common carriers rather thoroughly, in order to show that it is not.

A. The legal duties of a common carrier at common law grow out of the public trust which the carrier takes upon itself and hence must be carried out for all members of the shipping public to the full extent of the trust.

The common law duties of a common carrier derive from the public nature of the carrier's calling, as recognized for more than 250 years. This was pointed out by Chief Justice Holt in Layne v. Cotton (1701) 1 Ld. Raymond 646, 91 Eng.Rep. 1332:

"If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an inn-keeper refusing a guest, when he has room, against a carrier refusing to carry goods, when he has convenience, his wagon not being full. . . ." (Emphasis supplied)

The Supreme Court has long recognized the public nature of the carrier's duty also:

"He [the common carrier] is in the exercise of a sort of public office, and has public duties to perform.***He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal." New Jersey Steam Nav. Co. v. Merchants' Bank (1848) 6 How. (47 U.S.) 344 at pp. 382-383, 12 L. Ed. 465 at p. 482.

The public service aspects of the carrier's business were again recognized in the recent decision of the Supreme Court in Brotherhood of Railway, etc. Employees v. Florida East Coast Railway Co. (1966) 348 US 238, 16 L ed 2d 501, 86 S Ct 1420, in which it was said:

"The carrier's right of self-help is underlined by the public service aspects of its business. 'More is involved than the settlement of a private controversy without appreciable consequences to the public.' Virginia Ry. v. Federation, 300 US 515, 552, 81 L ed 789,802, 57 S Ct 592. The Interstate Commerce Act, 24 Stat. 379, as amended, places a responsibility on common carriers by rail to provide transportation. The duty runs not to shippers alone but to the public. . . .

"We emphasize these aspects of the problem not to say that the carrier's duty to operate is absolute but only to emphasize that it owes the public reasonable efforts to maintain public service at all times, even when beset by labor management controversies. . . ."

B. The basic obligations of a common carrier at common law are to receive, carry, and deliver all goods offered to him for transportation.

The Supreme Court has stated this basic duty of a common carrier in the following passages, among others:

"It is unnecessary to cite authorities to the proposition that it is the common law duty of the carrier to receive, carry,

and deliver goods.***" Wabash Railroad Company v. Pearce (1904) 192 U.S. 179 at p. 187, 24 S. Ct. 231 at p. 233. (Emphasis supp.)

"A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." The Niagara v. Cordes (1859) 21 How. (62 U.S.) 7, at p. 22, 16 L. Ed. 41, at p. 46.

"He [the common carrier] is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal." York Mfg. Co. v. I.C.Ry. Co. (1866) 3 Wall. (70 U.S.) 107 at p. 112, 18 L. Ed. 170, at p. 172.

C. The terms and extent of the carrier's obligation to receive property for transportation are determined by the "holding out", which is usually set forth in the carrier's published tariffs.

What the carrier holds itself out to do can be determined from its customary practices or from the services which the carrier advertises to the public that it is willing to perform. Since the adoption of the Interstate Commerce Act and other regulatory statutes requiring common carriers to publish and adhere to tariffs, the usual means of determining what the carrier holds itself out to do is to look in the tariffs.

The Supreme Court has stated it thus:

"The Shively Company stands the same as the other parties to the tariff. It was engaged in the general towboat business; it towed logs for others as well as for relator; it held itself out as a common carrier in that line of business and by the tariff gave public notice to that effect." State of Washington v. Kuykendall (1927) 275 US 207 at p. 212, 48 S Ct 41, at p. 42. (Emphasis supplied)

The nature and significance of the tariff has also been described thus:

"A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price. When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it." Union Wire Rope Corp. v. A. T. & S. F. Ry. Co. (CCA 8th, 1933) 66 F.2d 965 at 966-967, cert. den. 290 US 686.

Throughout the period from May 12 through October 17, 1966, during which defendant was refusing plaintiff's requests and demands for transportation service, defendant continued, by its published tariff, to hold itself out to furnish the services which plaintiff required. (Tran. p. 121, l. 6-19)

D. Since the basic obligation of the common carrier at common law arises out of the public nature of the carrier's business, it is independent of the contract of carriage.

No bill of lading or other contract between the shipper and the carrier is necessary to subject the carrier to liability for failure to perform its common law duty, for

the carrier's obligation is not merely to carry and deliver goods for which it has issued a special contract, but is to receive, carry and deliver all goods which it holds itself out as transporting. The common law rule is well summarized in 4 Ruling Case Law, p. 660, as follows:

"No special contract with a common carrier is required to subject him to all legal liabilities as such to the person applying, because the undertaking of a common carrier is general and embraces every one in the community, and to make it particular as an undertaking with a single individual it is only necessary that he should apply to the carrier, with such goods as the latter has undertaken to transport, in condition to be transported, at the place designated." (Emphasis supplied)

A comparable rule is stated in 13 C.J.S., Carriers Sec. 123b, p. 237 as follows:

"It is the duty of the carrier to issue a proper bill of lading, although failure to issue will not prevent the relationship of shipper and carrier from arising."

The United States Supreme Court has explicitly based the common law right of action against carriers upon the violation of duties imposed by law independent of contracts. In Hannibal & St. Joseph Ry. v. Swift (1871), 12 Wall. (79 US) 262 at p. 270, 20 L ed 423 at p. 428, the Supreme Court said of the common carrier's duties:

"Its obligations and liabilities in these respects were not dependent upon the contract of the

parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract." (Emphasis supplied)

E. A breach of the basic obligation of a common carrier constitutes a tort, and makes the carrier liable in damages to the shipper.

This principle is a necessary corollary of the one just set forth. The right of the shipper or consignee to sue the carrier in tort for failure to perform his public obligation, rather than in contract on the contract of carriage, is declared in the Restatement of Torts, Sec. 866, as follows:

"Aside from statute, a person who is under a non-contractual duty to furnish facilities to the public without discrimination is liable in an action of tort for violation of such duty to a person entitled to such facilities."

Even when a contract of carriage has been entered into, the contract may be disregarded:

"That they (the shippers) may waive their right to sue upon the contract and bring an action in tort for damages, if any they have sustained, is a rule of law well established by an almost unbroken line of authorities." Owen Bros. v. C.R.I. & P. Ry. Co., (1908), 139 Iowa 538, 117 NW 762 at p. 764.

III. The carrier's common law duties have not been abridged or supplanted by the Interstate Commerce Act or by Idaho statutes.

While both the United States and the State of Idaho have adopted legislation regulating certain aspects of transportation and the obligations of common carriers, such enactments reinforce and strengthen, rather than abridge or supplant the common law obligations of a common carrier.

A. Part One of the Interstate Commerce Act preserves all common law rights and duties of carriers which are not absolutely inconsistent with specific provisions of the act.

Section 22 reads:

"* * * Nothing in this chapter [act] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 USCA, §22.

Speaking of this section, the Supreme Court said in Penn. R. R. Co. v. Puritan Coal Co. (1915) 237 US 131 at p. 129, 35 S Ct 484 at p. 487:

"That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." (Emphasis supplied)

This holding was reiterated in identical language in Penn. R. R. Co. v. Sonman Shaft Coal Co. (1916) 242 US 120, at p. 124, 37 S Ct 46 at p. 47.

B. The common law duties of carriers have not been limited or supplanted by Idaho law.

Idaho Code, §62-402 provides, in pertinent part, as follows:

"Every such [railroad] corporation must. . .furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or is offered for transportation at the place of starting, at the junction of other railroads and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport and discharge such passengers and property at, from and to such places, on the due payment of toll, freight or fare therefor."

Idaho Code Sec. 62-403 provides:

"In case of refusal by such corporation or its agents so to take and transport any passengers or property, or to deliver the same at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit." (Emphasis supplied)

It will be observed that these statutes in no way abrogate the common law obligations of the carrier, discussed

earlier herein, to accept, carry and deliver all property offered for transportation in accordance with the carrier's holding out. On the contrary, they merely restate and codify the carrier's obligations and its liability for failure to perform them.

IV. Defendant established no legally sufficient excuse for its failure to provide service.

The fact of defendant's failure to provide transportation service to plaintiff, pursuant to its published tariffs, from May 12, to October 17, 1966 was not disputed. Moreover, the trial court appeared to recognize, in some degree, the defendant's burden to justify its failure to do so. (Tran. p. 182, l. 7 - 9)

We submit, however, that defendant failed completely to prove any legally sufficient excuse for its non-performance. In Swayne & Hoyt v. Everett (1919, CCA 9th) 255 Fed 71, in awarding damages to a plaintiff whose goods were refused shipment, this court said:

"It does not admit of doubt that a common carrier, with certain well-established exceptions, is under legal obligation to carry the goods of any member of the public who may tender them for carriage. That such a carrier, subject to such legal obligation, may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control, is readily conceded, but in all such cases the defense

is an affirmative one, and the burden is upon the carrier to both plead and prove it." 225 Fed at p. 74

(Emphasis supplied.)

Defendant alleged an act of God as an affirmative defense (Rec. p. 28)

A. Defendant must prove objective impossibility which it could not have avoided and the exercise of the high diligence required by its public trust.

As the Swayne & Hoyt case, supra, indicates, certain limited and well defined exceptions to the common carrier's absolute liability have long been recognized. Generally, the only acceptable excuses were that the carrier was prevented from performance by an act of God or the public enemy. New Jersey Steam Nav. Co. v. Merchants' Bank (1848) 6 How (47 US) 344 at p. 381, 12 L ed 465 at p. 82. Coggs v. Bernard (1703) 2 Ld. Raymond 909, 92 Eng. Rep. 107 at p. 112.

Recent decisions have expanded these exceptions only slightly, holding that the carrier is liable unless it affirmatively shows that loss resulted from the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity. Secretary of Agriculture v. United States 350 US 162, 100 L ed 173, 76 S Ct 244; Missouri Pacific Railway Co. v. Elmore and Stahl, 377 US 134 12 L ed 2nd 194, 84 S Ct 1142.

1. The liability of the carrier is not based on negligence but exists without fault, subject to exceptions which the law has come to recognize.

From earliest times, the law has imposed liability upon the common carrier, not because of fault on his part, but from his failure to perform his public trust.

"The books abound with strong cases of recovery against common carriers, without any fault on their part; and we cannot but admire the steady and firm support with which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject without bending to popular sympathies, or yielding to the hardships of a particular case." Kent "Commentaries" (14th ed.) Vol. II, p. 602

And the Supreme Court has said:

"The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants." Adams Exp. Co. v. Croninger (1913) 226 US 491 at p. 509, 33 S Ct 148, at p. 153

and more recently:

"The common law, in imposing liability, dispensed with proof by a shipper of a carrier's negligence in causing the damage. . . ." Secretary of Agriculture v. U. S. (I.C.C.), 350 US 162, 100 L ed 173, 76 S Ct. 244. (Justice Frankfurter, concurring)

Accordingly, it appears that the trial judge misconstrued the issues in the instant case when, in analyzing the issues, he stated:

"First, is the matter of negligence on the part of the plaintiff in the maintenance of the Neva Tunnel

and whether or not the necessity for the closing of the tunnel was proximately caused by any such negligence." (Tr. p. 182, l. 10 - 15)

2. The exceptions to common carrier liability are limited to cases where performance is prevented by circumstances over which the carrier had, and could have had, no control.

The essence of the long recognized exceptions to common carrier liability is the complete inability of the carrier to prevent the occurrence of the event causing his default.

"The general liability of the carrier, independent of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident -- in other words, the act of God or the public enemy." New Jersey Steam Nav. Co. vs. Merchants' Bank (1848) 6 How (47 US) 344 at p. 381, 12 L ed 265 at p. 82. (Emphasis supplied.)

Indeed, as pointed out in the exhaustive opinion of Chief Judge Fee of the U.S. District Court for the District of Oregon in the case of Montgomery Ward and Co. v. Northern Pacific Terminal Company (1953) 128 F Supp 475, 511:

"Even where prevented by the act of God or the public enemy, there must be an affirmative showing that

"it (the carrier) did everything in its power to carry out its absolute obligation." (Citing U.S. Express Co. v. Kountze Bros. 75 US (8 Wall) 342, 352, 19 L Ed 457; Penn R.R. Co. v. Olivite Bros. 243 US 574, 37 S Ct 468; and other cases)

This Court clearly stated the principle in Swayne & Hoyt v. Everett, supra, when it said that a carrier under a legal obligation to accept goods tendered to it

"may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control. . ." (Emphasis supplied) 255 Fed at p. 74.

3. The common carrier may not escape the consequences of a default if its negligence has contributed to the existence or continuance of the obstruction preventing service.

Since the common carrier's failure to serve is only excused when the carrier is prevented from giving service by cause over which it has no control, no excuse can be predicated upon a cause initially existing or continuing to exist because of the carrier's failure to exercise the diligence required of public servants.

a. The carrier is not excused if the interference could have been avoided by forethought. Applying this principle the Supreme Court imposed liability upon an express company for gold lost to a band of armed robbers, even though the company had inserted in its receipt for the gold

a clause exempting it from losses due to "mobs, riots, insurrections, or pirates." The court held that the company had a choice of two routes -- one safe and one running through dangerous and unsettled country. By failing to choose the safer route, the carrier subjected itself to liability. U. S. Express Co. v. Kountze Bros. (1869) 8 Wall (75 US) 342, 19 L ed 457.

Similarly, though a car shortage due to unusual and unforeseen demands is a lawful excuse for failure to furnish cars, the carrier is not excused if the shortage could have been anticipated and prepared for.

". . . It was defendant's duty to provide for such a situation. A common carrier cannot excuse its failure to meet natural and normal traffic conditions by saying that it failed to anticipate them or to provide against them. That would be merely offering its own nonfeasance as an excuse for the injurious consequences thereof."

Baker v. St. L. etc. R. Co. (1910) 145 Mo. A. 189, 197, 129 S W 436, 438.

In C. B. & Q. R. Co. v Manning (1888) 23 Neb. 352, 37 NW 462, at pp. 464-465, the court said:

"It is claimed that the high water, being an act of God, exonerates the plaintiff. There is no proof, however, that such floods were not to be anticipated, or that the railway had been so constructed as to withstand the same."

Thus even an act of God, if its effects can be anticipated and avoided, is no legally sufficient excuse for the carrier's failure.

b. The carrier is not excused unless the unavoidable interference was the sole cause of the default, unmixed with negligence. A case which illustrates this principle, Bell Lumber Co. v. Bayfield Transfer Ry. Co., 172 NW 955 (Wis), is as closely parallel to the present one, factually, as any we have found. The plaintiff in that case had a substantial quantity of logs in the woods awaiting shipment, part of it adjacent to plaintiff's siding and part on the railroad's siding. Traffic on the only railroad line serving plaintiff was suspended from April 3 to May 12, 1914, while repairs were being made to the defendant's bridges. On May 18, part of the lumber had not yet been shipped, though demands for service had been made. This lumber, which was standing on plaintiff's private railroad spur, was destroyed in a forest fire for which defendant was in no way responsible. Prior to the fire, part of plaintiff's lumber had been shipped and had been sold on a market which was somewhat lower than it had been a month before, when plaintiff first demanded service. Plaintiff sought damages for delay in accepting its lumber, based on the decline in market value which occurred during this period. Plaintiff also sued for its loss due to destruction of the balance of the lumber in the fire. The Wisconsin Supreme Court upheld plaintiff's right to recover from the common carrier defendant on both counts. The defendant claimed impossibility, due to the condition of its bridges and due to delays encountered in arranging financing of the repairs, but the court rejected this, pointing out that the bridges could be and were repaired and the service reinstated -- but not soon enough.

The court observed:

"The defendant's superintendent knew in 1913 that the road was bad and the bridges were deteriorating and badly in need of repairs, that defendant lacked funds for making repairs, but that no effort was made prior to the first of April by defendant to raise money with which to make repairs."

As to the fire loss, defendant denied proximate cause, but the court rejected this also, holding that the fire -- though an act of God -- could have been anticipated by defendant, who knew the risk of forest fire in that area, which increased as a result of the delay.

To the same effect, in Lehigh Valley R. Co. v. Allied Machinery Co. of America (1921) 271 Fed. 900, cert. den. 256 US 704, 41 S Ct 625, the court said:

"The argument that this explosion was to be treated like an act of God, such as the Johnstown flood, the San Francisco earthquake, or the volcanic eruptions at Mt. Pelee and Mt. Etna, does not convince us; but even in such cases of vis major the defendant would be obliged to show in addition that the loss was inevitable -- that is, could not have been prevented by the exercise of due care on his part." 271 Fed. at 903.

c. The carrier is not excused unless he shows that the method of performance which is obstructed is the only possible method. It is not sufficient for the carrier merely to show that the usual route or method used by it for performing the service it holds itself out to perform is obstructed. The

common carrier must make diligent efforts to find another route or method to transport the goods. C.R.I. & P. Ry. Co. v. Dawson, (1923) 157 Ark. 484, 248 SW 558; C.B. & Q. Ry. Co. v. Manning, (1888) 23 Neb. 352, 37 NW 462)

And in B. & O. R. Co. v. O'Donnell, 49 Oh.St. 489, 32 NE 476, the only "blocked tunnel" case which we have found, the Supreme Court of Ohio found the carrier excused from rendering service only so long as performance remained impossible. The tunnel was made impassable by a fire on January 1. Within a few days, "arrangements were made by the defendant, by which the express matter carried either way on the road could be and was transferred around the tunnel, and the plaintiff's goods could have been so transferred and delivered...." Accordingly, the court upheld an instruction that:

"If the tunnel was rendered impassable for cars, the defendant was excused from making delivery until the obstruction ceased, or other means of effecting the delivery could reasonably be procured; and then further delay in making the delivery, on account of the tunnel, was not excused...." 32 NE at 480.

B. The diligence and care which the common carrier must exercise is the extreme diligence and care commensurate with its character and status as a public servant discharging a public trust.

When the courts speak of the exercise of care and diligence by a common carrier, they do not refer to the ordinary care or diligence required of a reasonable man.

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties -- an object essential to the welfare of every civilized community. Hence, the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the reason of raising the most stringent motive for the exercise of carefulness and fidelity in his trust." (Emphasis supplied) N.Y.C. RR. Co. v. Lockwood (1873) 17 Wall. (84 US) 357, at pp. 377-378, 21 L.ed. 627, 639.

And the law permits the carrier to assert only those excuses which are consistent with this principle, thus:

"It was just and reasonable that they should not be chargeable for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against." (Emphasis supplied) Ibid, 17 Wall. at 380, 21 L.ed. at 640.

This long recognized general principle has been consistently adhered to up to the present day. C. & E.I. R. Co. v. Collins Produce Co. (1919) 249 US 186, 193, 39 S Ct 189, 190; American Trucking Assn. v. Atchison, T. & S.F. Ry. Co. (1967) ___ US ___, 87 S Ct 1608; Minn. & St. L. Ry. Co. v. Pacific-Gamble Robinson Co. (CA, Minn.) 215 F.2d 126.

With a similar general import, it is said in Michigan Consolidated Gas Co. v. F.P.C. (CA, DC, 1960) 283 F.2d 204:

"The fact that abandonment of public service requires government approval symbolizes the special legal status

"and obligations of common carriers and public utilities.

This includes an obligation, deeply imbedded in the law, to continue service." 283 F.2d at 214. (Emphasis supplied)

V. There was evidence from which the jury could have found that defendant did not discharge its duty to provide transportation service to plaintiff as required by the common law, the Interstate Commerce Act and Idaho statutes.

We submit that the rules and principles set forth in, perhaps, unnecessary detail in the preceding portions of this brief, as applied to the circumstances of this case, compel the conclusion that the trial court erred in holding defendant only to a standard of ordinary negligence and, by such standard, finding defendant free from liability, as a matter of law.

While the trial judge mentioned his conviction that the defendant "had an obligation to accept and carry plaintiff's lumber," and that the defendant "has the burden of showing the propriety of its reasons for not doing so," it is apparent that he regarded defendant's burden to be fully discharged if two things were shown: (1) that the necessity for the closing of the tunnel was not proximately caused by defendant's negligence; and (2) that defendant acted reasonably in its choice of method and procedure for reinstating the service.

The trial court found the first to be proved by finding that the closing of the tunnel was "unquestionably shown to have been caused by an unusual, massive movement of

earth and not through negligent maintenance of the structure. As shown later herein, this determination was not supported by the required overwhelming weight of evidence, but, right or wrong, the court's determination ignores completely such relevant and material questions as:

- (a) Was the condition of the tunnel such as to render its use impossible?
- (b) Could the closing of the tunnel have been avoided by proper maintenance or by reconstruction of the tunnel at an earlier, more favorable time?
- (c) Could defendant have provided plaintiff with substitute service of any sort?
- (d) Did defendant have any obligation to help plaintiff to minimize his losses by at least giving him reliable information about the probable duration of the suspension of service?

The second determination by which the trial court completely absolved defendant of any liability whatever, as a matter of law, was based on the finding that the defendant made a reasonable choice -- as an ordinary business decision, apparently -- as to the procedure followed to restore the service. Again, this determination ignores several significant questions:

- (a) Did defendant, as a common carrier charged with a public trust, fail in its duty to plaintiff and the public by not reinstating service as promptly as possible?
- (b) Did defendant fail in such duty by failing to plan the "daylighting" job in advance, or by failing to carry out its negotiations with the State of Idaho before the closure

of the tunnel?

(c) Did defendant fail in such duty by delaying restoration of the service to any substantial extent, merely to assure participation of the State in the cost of the project, when it was aware that its gain was the shippers' loss?

The trial judge not only refused to permit the jury to consider any of these issues, it would seem that he declined to consider them himself. Yet the evidence, and reasonable inferences therefrom, were clearly sufficient to justify submitting these issues to the jury; or -- to put it more accurately, in view of defendant's burden of proof -- the evidence was clearly not sufficient to justify deciding them in defendant's favor as a matter of law.

A. Defendant did not prove objective impossibility of performance, and the evidence shows that no such impossibility existed.

As we have seen, in order to excuse its failure to discharge its common law and statutory duties, defendant was required to prove not merely that performance had become difficult or expensive, but rather that it had become impossible. Defendant's proof fell far short of this; in fact, the evidence conclusively establishes the contrary.

The closing of the tunnel was not "caused by an unusual massive movement of earth" in any physical sense, so as to make the passage of trains through the tunnel physically impossible. There had been a collapse or cave-in of the tunnel some three or four weeks earlier, but this obstruction had been cleared

away. (Tran. p. 56, l. 18 - 25; p. 58, l. 15 - 17) The closing on May 12 was actually caused by the order of Mr. Pajari, defendant's division engineer, which was in turn caused by his belief that the tunnel was unsafe, following his inspection of the same date. (Tran. p. 77, l. 16 - 26) This may well have been a correct determination, but it should be recognized that we are not here concerned with a blocked tunnel through which trains could not pass, such as occurred about April 15. We are considering a suspension of service ordered by one of defendant's employees, who thought it was unsafe. The reason he thought so was because the tunnel was showing signs of new and rapid deterioration, evidenced by many new cracks in the timbers, with some supports down completely. (Tran. p. 77, l. 2 - 15; p. 78, l. 1 - 12).

Thus, it is clear that the discontinuance of freight service in and out of Elk River through the tunnel was not due to impossibility in the objective sense. Whether the closing of the tunnel was justified is another question -- and one, we submit, which the jury should have been permitted to decide, except that it was not determinative of defendant's liability anyway. If the use of the tunnel involved any great risk, we would not deny, of course, that its closure was proper, but this was not the first time the tunnel had showed signs of imminent collapse. (Tran. p. 53, l. 23 - p. 54, l. 13; p. 51, l. 25 - p. 52, l. 8)

But if we were to concede, arguendo, that temporary closing of the Neva tunnel was justified, this is not to say that suspension of freight service in and out of Elk River for more

than five months was justified. Certainly, the continuance of such service was not impossible. Defendant proved this when it carried one carload of plaintiff's lumber after the tunnel was closed -- by truck to Bovill and by rail from there. (Tran. p. 152, l. 25 - p. 153, l. 11) As in the other blocked tunnel case, (B. & O. Railroad Co. v. O'Donnell, 49 Oh.St. 489, 32 NE 476, 480) "arrangements were made by the defendant, by which the [freight ...] could be and was transferred around the tunnel, and the plaintiff's goods could have been so transferred and delivered." But the defendant herein, having found the way and hauled one carload, failed and refused for five long months to transport any more of plaintiff's lumber this way.

The defendant's reason for trucking this one carload of lumber was that it felt itself legally obligated to do so, by reason of the fact that it had accepted a bill of lading covering this car, (Tran. p. 153, l. 19 - p. 154, l. 12) indicating that the defendant recognizes its obligation to transport freight tendered in accordance with its tariffs if -- but only if -- it has signed a bill of lading covering it. This restricted view of the carrier's obligation was shared by its district manager of sales and, perhaps, its counsel and the trial judge also. (Tran. p. 126, l. 10 - p. 127, l. 18) but, as shown earlier herein, supra, page 25, it is not the bill of lading which imposes the obligations upon a common carrier but, rather, the carrier's assumption of a public trust and the public nature of its business. Hannibal & St. Joseph Ry. v. Swift (1871) 12 Wall. (79 US) 262,270, 20 L ed 423,428.

Defendant's district manager of sales, Mr. Sullivan,

expressed the view that it would be an illegal act for the defendant to provide freight service by truck from Elk River to Bovill. (Tran. p. 123, l. 10 - 17) Thus, paradoxically, it was illegal for them to do, but they were legally obligated to do it, so they did -- but only once.*

To further evidence its inability to provide alternative service to plaintiff by truck, Mr. Sullivan testified that defendant was not in the trucking business in Idaho, (although it is elsewhere) and that it had no trucks nor trucking rights in Idaho. (Tran. p. 118, l. 13 - p. 119, l. 6)

We submit, however, that all of the evidence falls far short of establishing -- so conclusively that reasonable minds could not find otherwise -- that it would have been impossible for defendant to provide any service to plaintiff throughout the more than five months that defendant was refusing to accept shipments from Elk River, tendered by plaintiff in accordance with defendant's continually effective published tariffs.

Perhaps the tunnel was unsafe and had to be shut down; perhaps defendant was prohibited by law to provide any alternative service; but defendant certainly didn't prove either contention!

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*Mr. Sullivan testified, often over objection, as to various aspects of the carrier's legal rights and duties. To him the matter was relatively simple -- if the tunnel was closed, they couldn't handle shipments; if they couldn't handle shipments, they didn't accept bills of lading; and if they didn't accept bills of lading, they had no obligation to the shipper. The reliability of his views on this subject is, perhaps, best illustrated by his testimony at page 132 of the transcript (l. 6 - 16) in which he expressed the opinion that the defendant's obligations would be the same if it had capriciously blown up the tunnel!

B. Defendant did not prove that its negligence was not a contributing factor to its failure to serve.

The major part of this brief has been devoted to an effort to establish that this case should not have been decided, either by judge or jury, on the simple issues of whether defendant's negligence was the proximate cause of the closing of the tunnel and whether defendant acted "reasonably" in reinstating the service. Nonetheless, if these restricted issues were determinative, the motion for involuntary dismissal should have been denied, for not all of the relevant evidence -- nor even a preponderance of it -- tended to exonerate defendant.

Assuming, for the sake of argument, that the tunnel failure actually made it impossible for defendant to discharge its duties as a common carrier, defendant would still not be free from negligence -- or from liability -- as a matter of law.

1. The tunnel failure could have been anticipated and avoided.

As we have seen, a common carrier is not excused even by an event which renders its performance impossible, if the event could have been anticipated and avoided. To fail to so avoid the consequences of the event amounts to a failure to satisfy the high degree of care required of common carriers and is, therefore, negligence.

There is ample evidence, none of it contradicted, that the defendant herein could have anticipated the tunnel failure and, in fact, did anticipate it. As early as 1956, one of defendant's employees, after an inspection, called attention to

the condition of the tunnel and the tunnel lining, the crushed and split condition of many of the supports, and concluded:

"These helper bents are strictly a stop-gap measure as the rotten original lining cannot form a solid backing for them. We are spending a lot of money and still losing ground." (P. Ex. 5, Tran. p. 52, l. 5 - 8)

And again in December, 1956, after noting that the negotiations with the State for a joint daylighting project seemed to have bogged down, this same employee stated:

"In view of the above, we should definitely plan on the concrete lining no later than 1958." (P. Ex. 18)

Mr. Pajari, defendant's division engineer, discounted these observations and recommendations with the comment that

"The fact remains the tunnel stood for ten years."
(Tran. p. 52, l. 19 - 20)

Thus he suggests that the defendant was wise to ignore the recommendations for daylighting or concrete lining back in the fifties, and was wise to do very little maintenance on the tunnel, since they got by without any serious difficulties until April, 1966.

In 1964, defendant's section foreman checked the tunnel and reported that:

" . . . in Neva tunnel one of top timbers and one on side have came [sic] out right at the joint where top decking comes together and it appears to [the section foreman] that other timbers are cracking. This is in west end and it is worse since he last talked to C.E.M." (P. Ex. 8, Tran. p. 53, l. 23 through 54, l. 1)

In July, 1964 Mr. Pajari and his superintendent inspected the tunnel, found it to be deteriorating, and reported:

"We have considerable work to be done on the Neva tunnel this year and the portion of the tunnel where the two pieces fell out is included in 64 work." (Tran. p. 55, 1. 13 - 16)

Despite the condition of the tunnel and the recommendations for considerable work on it, Mr. Pajari testified that no maintenance or repair work was done in 1964 or 1965. (Tran. p. 51, 1. 2 through 4) With reference to these years, Mr. Pajari stated that they "had some maintenance work planned according to the record but did not consider it necessary to carry it out." (Tran. p. 69, 1. 20 through p. 70, 1. 10)

Moreover, Mr. Pajari testified that even the alleged "massive movement of earth" was a common natural occurrence and one which could be anticipated, although the exact location of any such occurrence might not be predictable with accuracy. (Tran. p. 97, 1. 14 through p. 98, 1. 24)

We submit that the foregoing evidence would have justified, if not compelled, any reasonable juror to conclude that the railroad was negligent in its maintenance practices and in failing to anticipate and avoid the consequences thereof.

2. Defendant's negligence was a proximate cause of the closing of the tunnel.

The trial court's remarks upon taking the case from the jury indicate that he may have recognized the existence of

negligence on the part of the defendant, but that he felt such negligence, as a matter of law, did not contribute proximately to the "necessity for the closing of the tunnel". (Tran. p. 182, l. 11 - 15) In order to reach this conclusion, the trial judge must necessarily have given credence to that small portion of the evidence and inferences therefrom favorable to the defendant, while d while disregarding much other evidence. For certain-ly the evidence was not all one way.

In support of the trial court's determination that the closing of the tunnel was "unquestionably shown to have been caused by 'an unusual massive movement of earth" -- which, incidentally, defendant never alleged*

The relevant evidence was as follows:

Pajari testified that his inspection on May 12 disclosed that the tunnel was under extreme and severe stress, evidenced by cracks in the vertical plane, in the posts and arch members and also in the horizontal, showing that there "necessarily had to have been a displacement of the lining of the tunnel" toward Bovill, and the cracks were fresh. (Tran. p. 71, l. 5 - 16) Then followed what the trial court apparently regarded as the only truly significant testimony in the entire case, though we submit that it is by no means unequivocal. On redirect

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* Defendant's answer referred only to a "tunnel cave-in", but at the trial defendant went to some length to try to show that it wasn't really a cave-in, but was some less familiar natural phenomenon, which caused the shutdown of the tunnel. (Rec. pp. 26 - 28; Tran. p. 78, l. 1 - 12; p. 63, l. 7 & 19; p. 62, l. 8 - 18)

examination by Mr. Nelson, defendant's division engineer, Mr. Pajari, testified as follows:

Q. Did the condition of the tunnel at the time of your inspection on May 12, 1966, differ from the inspections you have done over the last ten years?

A. What do you mean?

Q. Was it in a different condition than previously?

A. Yes, very definitely a different condition indicated there as in places it showed a massive movement of earth and rock above the tunnel.

Q. Had that ever happened prior to May 12, 1966?

A. Well, other than what had happened at Elk River On April 12?

Q. Did you ever have a movement of the type you described in the tunnel prior to May 12, 1966?

A. No.

Q. You mentioned horizontal cracks, and so forth, inside the tunnel. Can you tell us how this differed from say any trouble you had with the tunnel prior to that date?

A. Well, the normal failure of the timbers because of age, moisture, and so forth, but this was actually a separation of the fibers of the timbers.

Q. Had that condition been in existence prior to that?

A. I never observed it.

Q. In other words, this was actually a split in the timbers due to pressure of the rock above?

A. Earth and the rock. It would be horizontal as well as vertical in places and there had been displacement of the timbers of the tunnel to the Bovill end.

Q. What caused the earth movement and shifting of the rock on or about May 12, 1966, or prior thereto?

Mr. Park: I object to that. I don't think he is qualified to answer that.

The Court: I will let him testify to what happened, if he knows. I am sure if he doesn't know he will say so.

A. All structures of nature, all grades, disintegrate, leveling out. There is an action of the elements of water, and so forth, on portions of the Neva Tunnel and this was an accumulation of earth formation and stresses that caused the failure." (Tran. p. 71, l. 17 - p. 73, l. 8.)

There was other evidence on this subject -- most of it double edged. Mr. McGovern, one of defendant's foremen, was reported to have expressed the opinion that "there had been movement in the tunnel" (Tran. p. 73, l. 19 - 27) and the report of regional engineer Smith (P. Ex. 12) referred to new cracks or additional openings in the old cracks in 90% of the post or segment members and reporting that 20% of the defective supports showed cracks in the vertical plane "indicating longitudinal movement of the timber tunnel lining. The remainder of the cracks were in the horizontal plane of the members "indicating vertical load undoubtedly unevenly distributed causing the failure."

Mr. Smith's report continued with an observation that there was considerable evidence of lateral movement in the

top of the tunnel showing up in the segments and lagging, most of it within the recent past -- perhaps a month -- "with most of the movement showing up in the past week." Foreman McGovern had noted a change within the past few days, and there were three segments in the east end which were displaced to the extent that two of them would undoubtedly fall out at the next slightest movement. Mr. Pajari, with some help from defendant's counsel, testified that the movement was very recent and that a "shifting of the earth and rock and of the tunnel itself" would be the only force sufficient to produce the phenomenon they had. (Tran. p. 77, l. 6 - 15)

The foregoing is virtually all of the evidence from which the jury might have inferred that any dangerous condition existing in the tunnel was due to "an unusual massive movement of earth." Even standing alone, it would seem to be somewhat less than conclusive. Considered together with other evidence in the record, certainly an open question of fact was clearly presented.

Consideration of the reports of defendant's employees would seem to indicate that, in their opinion, if there was any principal cause of the tunnel problems, it was probably the fact that repairs had been improperly made for many years. This is referred to in plaintiff's Exhibit 17, a 1955 memorandum, in which it is said that:

"I cannot understand the wisdom of using creosoted material as even if the tunnel was never daylighted, these helper bents are only temporary as they will be

placed on a backing of old, rotten timber, which formed the original lining of the tunnel." (Tran. p. 140, l. 17 - p. 41, l. 2)

And in plaintiff's Exhibit 5, it is said:

"These helper bents are strictly a stop-gap measure as the rotten original lining cannot form a solid backing for them." (Tran. p. 52, l. 6 - 8)

Also in plaintiff's Exhibit 10, it is said:

"As near as I can determine cause of this condition [separation and dropping out of crown timbers] due to old original lining being left in place and repair lining set inside. Present lining is now shoving back on the sides permitting crown timbers to loosen and drop out." (Tran. p. 26, l. 3 - 7)

Plaintiff's Exhibit 25, dated April 18, 1966, also makes note of this condition and advises:

"I find that most of the center portion of the tunnel was repaired in the manner previously mentioned. This being the case, tunnel will have to be checked periodically and any evidence of undue stress of roof segments will have to be given immediate attention.

Consideration should be given to daylighting this tunnel in the near future."

Further doubt is cast upon the "massive movement of earth" theory by the numerous bits of evidence which indicate that the movement was not of the earth, but of the lining of the tunnel. For example, Mr. Smith, reporting on

the May 12, 1966 inspection referred to "longitudinal movement of the timber tunnel lining." (P. Ex. 12, Tran. p. 74, l. 6 - 8)

Even Mr. Pajari was somewhat less certain what actually occurred than was the trial court. His memorandum of April 25, 1966, (P. Ex. 11; Tran. p. 57, l. 24 - p. 58, l. 25) stated:

"Per phone conversation, herewith, 7 photographs showing the situation at the west portal of Neva Tunnel on the Elk River Line where a portion of lining caved in on April 12. Counting from west to east the collapse involved frames 5 to 10 inclusive. It is not quite certain whether the failure of the frames precipitated slide of material into the bore or whether the reverse was true. In any event, approximately 100 yards of material came down to the track through the opening. Photos 1 to 4 inclusive are general views, the remainder are pictures of the interior in the area of the collapse.

Please note particularly that past repairs have been made by inserting new frames inside the old untreated frames which account decay show distortion which in turn permits distortion of the newer frames.

Per telephone reports we were able to restore traffic for the night of April 15. Replacement of the missing frames and of the remainder to the west is proceeding.

As your file will probably show we have a further inquiry from the Washington State Department of Highways [sic] concerning the joint project that has been under rather desultory consideration for a number of years."

At the trial, testifying as to the reason for taking the tunnel out of service, he stated:

"Actually it was movement of the frames supporting the rock and earth above the tunnel." (Tran, p. 78, l. 8-9)

This then was the evidence, in essence, directly relating to the true condition of the tunnel in April and May, 1966, which persuaded Mr. Pajari that it had become dangerous and that it should be closed. At best, this evidence is far from conclusive. It may have been a massive movement of earth, an act of God, perhaps, but a reasonable jury might very well have found otherwise.

Perhaps this "massive movement of earth" was akin to an act of God -- unprecedented, not to be foreseen, and unavoidable. Perhaps the tunnel would have been faced with imminent collapse requiring closure, even if the railroad had exercised the utmost diligence and if the tunnel had been beautifully maintained, regularly inspected and diligently repaired. And it is possible, we suppose, that defendant's "stop-gap" maintenance of the past many years, its failure to follow the suggestions or comments of its engineers, its failure to carry out recommended maintenance work -- or any maintenance work at all -- in either 1964 or in 1965, had nothing whatever to do with the deterioration of the tunnel to the point where it became unsafe. But, viewing the evidence and inferences therefrom most favorably to plaintiff's case, can it positively be said that reasonable men could not find otherwise?

3. Defendant failed to provide alternative or substitute service during the emergency.

The evidence showed that plaintiff made numerous requests for assistance with his shipping problem from defendant, in the form of truck service to Bovill, provision of a lift truck there, or merely a loading platform. Although these requests met with no clear refusal, defendant furnished him with no assistance whatever -- except for trucking the one carload from Elk River to Bovill. (Tran. p. 14, l. 14 - p. 15, l. 3; p. 142, l. 9 - 24; p. 144, l. 10 - 24; p. 168, l. 4 - 18.)

Defendant advised another Elk River shipper that no substitute service could be given because of I.C.C. regulations (P. Ex. 3, Tran. p. 17, l. 2 - 12); and defendant's district manager of sales so testified -- at least as to provision of a fork lift. (Tran. p. 124, l. 19 - p. 125, l. 1) His position with respect to loading facilities is less clear. (Tran. p. 123, l. 18 - p. 124, l. 18) But whatever Mr. Sullivan's opinion, these self-serving declarations cannot be regarded as conclusive proof that defendant could not legally provide any substitute service.*

*That there is such a thing as substitute service is evident from Plaintiff's Exhibit 21. This is a letter from the assistant general manager for the Western Region to the general manager of the railroad, in which the writer, discussing plaintiff's situation, found it necessary to advise:

"I find that the V. L. Johnson Lumber Co. have trucked 4 carloads of lumber to Bovill for loading on rail cars. No substitute service has been provided by the railroad."

One wonders if this advice would have been required if substitute service were absolutely prohibited.

Section 1 (15) of the Interstate Commerce Act (49 USCA § 1(15)), if its language is to be given its ordinary meaning, would seem to provide otherwise:

"§ 1, par. (15). Powers of the Commission in case of emergency. Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, ... (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such period as it may determine, and to modify, change, suspend, or annul them...."

While this section seems usually to have been applied to car shortages and similar emergencies, it certainly is not expressly limited to such situations, and we find nothing in the Act prohibiting establishment of emergency service arrangements.

The carrier may not discriminate, of course. Services furnished to plaintiff during the tunnel shut-down would have had to be furnished to other carload shippers of lumber from Elk River -- perhaps to all carload shippers from that point. But there were only three or four of them. (Tran. p.21, l. 1-13)

C. Defendant did not prove that it exercised the extreme diligence and care with which it was charged.

As shown earlier herein, (pages 37 - 39) a common carrier is held to a standard of diligence and care commensurate

with its status as a public servant discharging a public trust. Accordingly, defendant owed certain obligations to its customers, the shippers, which the ordinary person or business corporation would not owe. Its freedom of choice was somewhat restricted, and it could not decline to take actions necessary to the interests of the shippers merely because such actions were inconvenient or unprofitable for the carrier.

"A carrier has a duty to provide service to all the public, and such duty requires it to be furnished where it is unprofitable as well as where it is profitable."

Application of Omaha Transit Co. (Neb.) 94 N. W. 2d 461

By these standards, the evidence established that defendant herein did not measure up.

1. Defendant failed to take necessary corrective measures at a time when disruption of service could have been avoided.

The necessity for permanent repairs to the Neva tunnel -- either by daylighting or cement lining -- was known to defendant as early as the fall of 1954. (Tran. p. 137, l. 1 - 23) The daylighting project, as a joint venture with the State of Idaho, was proposed at that time (Tran. p. 137, l. 23 - p. 138, l. 15), and it was pointed out that from December to June "the problem of maintaining traffic during the work would not be encountered." (Tran. p. 138, l 16 - 23)

In late 1955, the urgency of the project was stressed by one of defendant's engineers in a report in which he said:

"After Webber came back from the meeting in Chicago, going over the 1956 work sheet, he advised that Crew C was to go to Neva tunnel in January to install several helper bents to make the tunnel safe for another year or two until we could consummate a deal with the State for daylighting the tunnel. Webber advises he was told to use creosoted material.

"I cannot understand the wisdom of using creosoted material as even if the tunnel was never daylighted, these helper bents are only temporary as they will be placed on a backing of old, rotten timber which formed the original lining of the tunnel.

"Will you please advise."

Despite the fact that several of defendants employees were aware of the grave necessity for permanent repairs, and that the daylighting project could have been accomplished during the fifties without seriously disrupting traffic, the project dragged along "under rather desultory consideration for a number of years" -- until June, 1967, after the condition of the tunnel became truly desperate and it had been closed, (Tran. p. 58, l. 24 - 25; p. 81, l. 7 - 13)

2. Defendant did not prepare in advance for the anticipated collapse of the tunnel so as to reduce the duration of the suspension of service.

As pointed out in the preceding section, defendant had known for years that a major rebuilding of the tunnel was inevitable. Yet defendant not only failed to undertake the

project until after it was necessary (or thought to be necessary) to close the tunnel and cut off freight service to Elk River, it even failed to plan in advance for the tunnel project -- by completing the required surveys, engineering, purchasing of rights of way, financing, and negotiating with the State. All of these things, as well as bid solicitation, selecting of contractor, execution of contracts and related matters, had to be done -- according to Mr. Pajari -- between May 12 and August 17, 1966, when the contract for the project was let. (Tran p. 82, l. 11 - p. 84, l. 19; p. 93, l. 10 - 22)

Thereafter, on August 23, the contractor moved onto the job, and 52 days later it was completed. On October 17 the rail service in and out of Elk River was finally reinstated. The service had been suspended, after the initial four-day period in April, a total of 158 days -- the best part of the year in Elk River and almost the entire operating season for plaintiff's sawmill -- during which time the lumber market declined steadily from record highs to extreme lows, and plaintiff lost about \$30,000. Yet the actual construction -- working two shifts just 'part of the time' -- required less than one-third of this period. (Tran. p. 93, l. 21 - p. 95, l. 18; P. Ex. 19, 20)

3. Defendant did not reinstate the service as promptly as possible.

Defendant does not force us to speculate as to the reasons for the long delay in restoring service. Defendant had what it seems to believe was the best reason in the world -- to save money. And save money it did! (Tran. p. 94, l. 11-20)

This was a laudable motive, of course. If defendant were an ordinary business corporation, it would probably be an unassailable one. But it wasn't; it was a common carrier, holding itself out by its published tariffs to accept, carry and deliver freight by rail from Elk River, for more than five months but refusing to do so. In these circumstances, defendant was not free to subject plaintiff to loss by refusing to perform its duty, merely to save money.

a. Defendant elected to defer repairs pending agreement with the State of Idaho. It is readily apparent from Mr. Pajari's testimony that defendant did, in fact, delay the daylighting project to assure the State's participation in the cost. (Tran p. 81, l. 7 - p. 82, l. 18) Part of his testimony was as follows:

Q (Mr. Park) You testified to problems arising in connection with acquisition of additional right-of-ways and surveys and that sort of thing. In fact, the major part of the delay in starting this project resulted, did it not, from the negotiations with the State?

A Preparation of plans and negotiations with the State, yes, sir.

* * *

Q Would you agree, Mr. Pajari, that the action of the Railroad with respect to reinstatement of the service through the Neva tunnel and its course of action was dictated primarily by the economic situation?

* * *

A I am not personally aware of all the intricacies of management causes but certainly in determining what plan was to be followed the economics of money and time would be very influential.

* * *

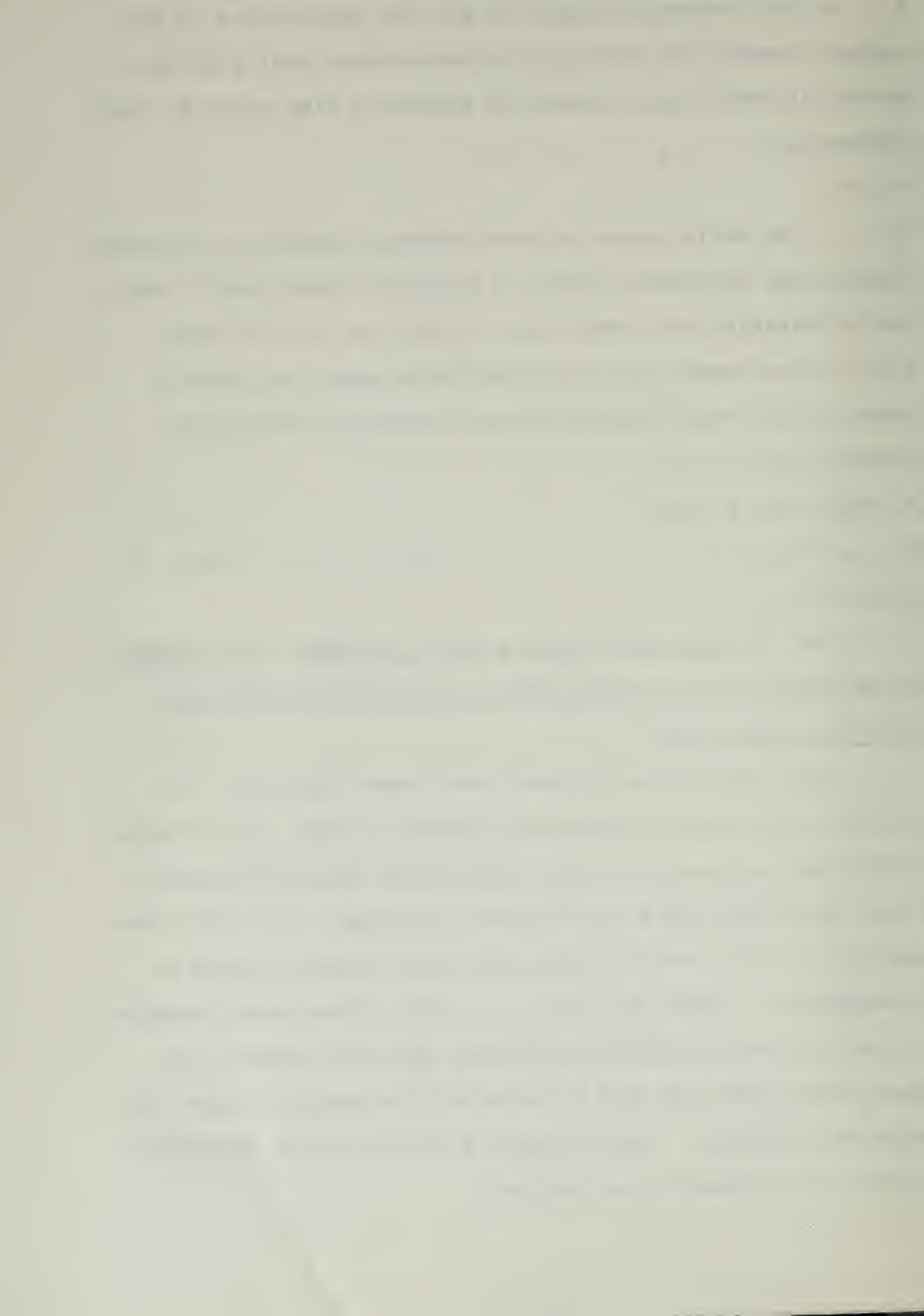
Q . . . By making more or less temporary repairs on occasion rather than permanent repair of the Neva Tunnel until 1966 and by delaying the actual work on the job in 1966 until after an agreement had been negotiated under the State's share of the cost Milwaukee Road realized a substantial saving, did it not?

A Yes, that's right.

(Tran. p. 101, l. 5 - 10, l. 25 - p. 102, l. 11; p. 104, l. 19 - p. 105, l. 1)

b. By deferring repairs until agreement was reached with the State, defendant realized a substantial saving to plaintiff's great loss.

The daylighting project cost about \$180,000. Of this amount, the State of Idaho paid almost 69,000. By refusing to accept any shipments for the five months period, defendant may have deprived itself of \$36,600 in revenue -- \$31,500 from plaintiff, \$5,100 from the other Elk River Shipper, based on 1965 shipments. (Tran. p. 112, l. 3 - 14) Thus, even assuming that the \$36,600 in revenue would have been net income, defendant saved about \$32,400 by delaying the project to get the State's contribution. This is just a bit more than defendant lost from the suspension of service.



As a common carrier, obligated under the law to use the utmost care and diligence in the performance of its public trust, defendant should not be allowed -- as a matter of law -- to benefit from its own default, to the plaintiff's disastrous loss.

4. Defendant failed even to give plaintiff reliable information regarding the probable duration of the suspension of service.

It is apparent from the evidence that a subject of very great concern to plaintiff was the probable duration of the suspension of service. He called Mr. Sullivan about it on at least one occasion (Tran. p. 111, l. 8 - 18) and he frequently asked the station agent in Bovill, Mr. Holland, about it. (Tran. p. 143, l. 2 - 4) These gentlemen made some effort to find out, apparently, but no one was ever able to tell them.

In response to a written request from another Elk River shipper, defendant's superintendent advised that the line would be out of service until at least July 15. (P. Ex. 3, Tran. p. 17, l. 13 - 17) Either from seeing this letter or by inquiry to Mr. Sullivan, plaintiff was advised that the railroad would open on or about July 15, 1966.

Relying on this initial advice, plaintiff elected not to substantially alter his method of operation, believing that he could get by if the service were restored by July 15. (Tran. p. 164, l. 25 - p. 165, l. 21)

On August 9, 1966, plaintiff had his attorneys write

to defendant (P. Ex. 1). No response to this letter was received until about September 1, when defendant's western counsel advised that the service was expected to be restored by the middle of October. (P. Ex. 2) By the time this first reasonably accurate information was received by plaintiff, both the operating season in Elk River and the lumber market were waning rapidly.

Defendant was well aware of the effect of the suspension and the effect of the inability to determine its probable duration. Mr. Sullivan, apparently without being told, assumed that it could put Mr. Johnson out of business. (Tran. p. 116, l. 23 - p. 117, l. 19) Yet none of defendant's employees or officers took the defendant's obligations as a public utility seriously enough to bother to obtain any reliable information for its shippers, until about three weeks after plaintiff's attorneys had advised defendant that plaintiff would hold it liable for his damages.

It is quite possible, of course, that defendant itself did not know in May or June how long the service would be suspended -or perhaps, whether the service would be reinstated at all.*

The chief carpenter apparently estimated the duration at three to four months from about May 13 (P. Ex. 12) but of course it was impossible to predict with any accuracy, because of the uncertainties inherent in the negotiations

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*The defendant's general manager wrote its superintendent on May 26 requesting information on Elk River traffic for the past five years and anticipated traffic "so we can properly evaluate the economics of restoring Neva Tunnel." (P. Ex. 24)



with the State of Idaho. Mr. Pajari testified that the project, which took just over five months, "went very well considering the nature of the work and the parties involved." (Tran. p. 96, l. 15 & 16)

At any rate, Pajari, at least, was certain at the outset that the tunnel would be out of service for at least three to four months and would certainly not be back in by July 15. (Tran. p. 61, l. 8 - 13)

But unfortunately nobody ever bothered to tell this to the plaintiff, Mr. Johnson, -- the one person most vitally concerned.

D. Defendant's abandonment of service for an extended period without I.C.C. authority subjects it to liability.

Under common law, the Interstate Commerce Act (49 USC § 1(18) or Idaho statute (I. C. §61-307) defendant, as a common carrier, could not abandon or discontinue a portion of its established line or services without subjecting itself to liability to persons damaged thereby, except upon authorization of the appropriate regulatory agency.

As stated in Michigan Consolidated Gas Co. v. F.P.C., (CA-DC, 1960) 283 F 2d 204:

"The fact that abandonment of public service requires government approval symbolizes the special legal status and obligations of common carriers and public utilities. This includes an obligation, deeply embedded in the law, to continue service." (283 F 2d at 214; See also, Application of Union P. R. Co., 64 Idaho 597, 134 P 2d 1073.)

As we have seen earlier herein, the carrier may suspend service when it is impossible for him to perform it, and in certain circumstances this suspension on an emergency basis would absolve him from his obligation to accept, carry, and deliver proffered shipments. But this was not such a situation, and our research has disclosed no case in which a common carrier was held justified in refusing service for a period of anything like five months, while its tariff covering such service remained in effect.

As defendant's employees seem to recognize, it was an unusual situation! (Tran. p. 158, l. 1 - 14; p. 124, l. 25 - p. 125, l. 13)

On May 26, 1966 defendant's superintendent wrote to the general manager, L. V. Anderson, as follows:

"Until repairs completed on Neva Tunnel suggest embargo be placed on all inbound and outbound traffic stations traveling to Elk River immediately." (Tran. p. 106, l. 18 - 24)

In response to this suggestion, however:

"L.V.A. called and said no embargo" (Tran. p. 106, l. 25 - p. 107, l. 3)

The reason for this action on the part of defendant does not appear. We submit that it may have been -- and the jury would have been justified in inferring -- that no embargo was placed because the imposition of an embargo would have required defendant to obtain an ordinance from the Interstate Commerce Commission under Section 1(15) of the Act, or an order authorizing partial abandonment under Section 1(18). In connection

with the issuance of either order, the Commission could have imposed terms or conditions upon defendant for the protection of affected shippers.

At the very least, the seemingly strange behavior of defendant in this situation, with reference to its failure to seek any order whatever from the Interstate Commerce Commission or the Idaho Public Utilities Commission, is further evidence of defendant's callous disregard for the rights and interests of the plaintiff and the public, and for defendant's common law obligations to them.

Proposition Two -- THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF HAD FAILED TO PROVE ANY DAMAGES WITH SUFFICIENT CERTAINTY.

After ruling against plaintiff on each of the two issues which the trial judge saw in this case -- negligence of the defendant as the proximate cause of the tunnel closure and the reasonableness of defendant's procedure to reinstate the service -- the court stated:

"Assuming arguendo that I may be in error in either of the first two determinations, there is still the question of damages. Damages must be proved by the plaintiff with sufficient certainty that a jury can set the damages by some reasonable measure and not have to resort to speculation or conjecture." (Tran. p. 183, 1. 15 - 25)

After mentioning some of the evidence of damages and certain items which he believed were essential and had not been

shown, the judge continued:

"In order to arrive at a judgment in this matter the jury would, in my opinion, have to speculate to bring in a damage verdict. The evidence is not sufficient and the plaintiff has failed in his burden of proving damages with sufficient certainty." (Tran. p. 184, l. 16 - 21)

It is respectfully submitted that, once again, the trial court erred in its determination.

I. If an injury resulting in damages is shown, the amount of damages is a jury question and need not be shown with exact precision.

Under Idaho law, the jury must estimate the proper amount of damages to be awarded as best they can by reasonable probabilities based upon their sound judgment as to what would be just and proper under all the circumstances. Shrum v. Wakimoto, 70 Idaho 252,256, 215 P.2d 991.

"Where a regular and established business is injured, interrupted or destroyed by the wrongful acts of another, the measure of damages, when and if recoverable, is the net loss and not ~~diminution~~ in gross income. Hence in the case before us, if the loss of business was occasioned by the acts of defendant, the measure of damages would be the loss of profits, if any, resulting from such wrongful act." (Williams v. Bone, 74 Idaho 185,188, 259 P.2d 810)

And the Idaho Supreme Court has held that damages for injury to an established business need only be established with reasonable certainty. Boise Street Car Co. v. Van Avery, 61 Idaho 502, 103 P.2d 1107.

A. Proof of the extent of damages need not be made with the certainty required in proving liability for damages.

A firmly established rule of damages is that the extent or amount of damages suffered need not be proved with the certainty required to prove the fact that some damage to plaintiff resulted from defendant's wrongful conduct. As the Supreme Court has said in Story Parchment Co. v. Paterson Parchment Paper Co. (1931) 282 US 555, 51 S Ct 248:

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount."

282 US at 562, 51 S Ct at 250.

This rule is particularly applicable where the defendant's wrongful conduct contributes to plaintiff's inability to show his damages with certainty. Bigelow v. R.K.O. Radio Pictues, (1946) 327 US 251, 66 S Ct 574. In the Bigelow case, the court said:

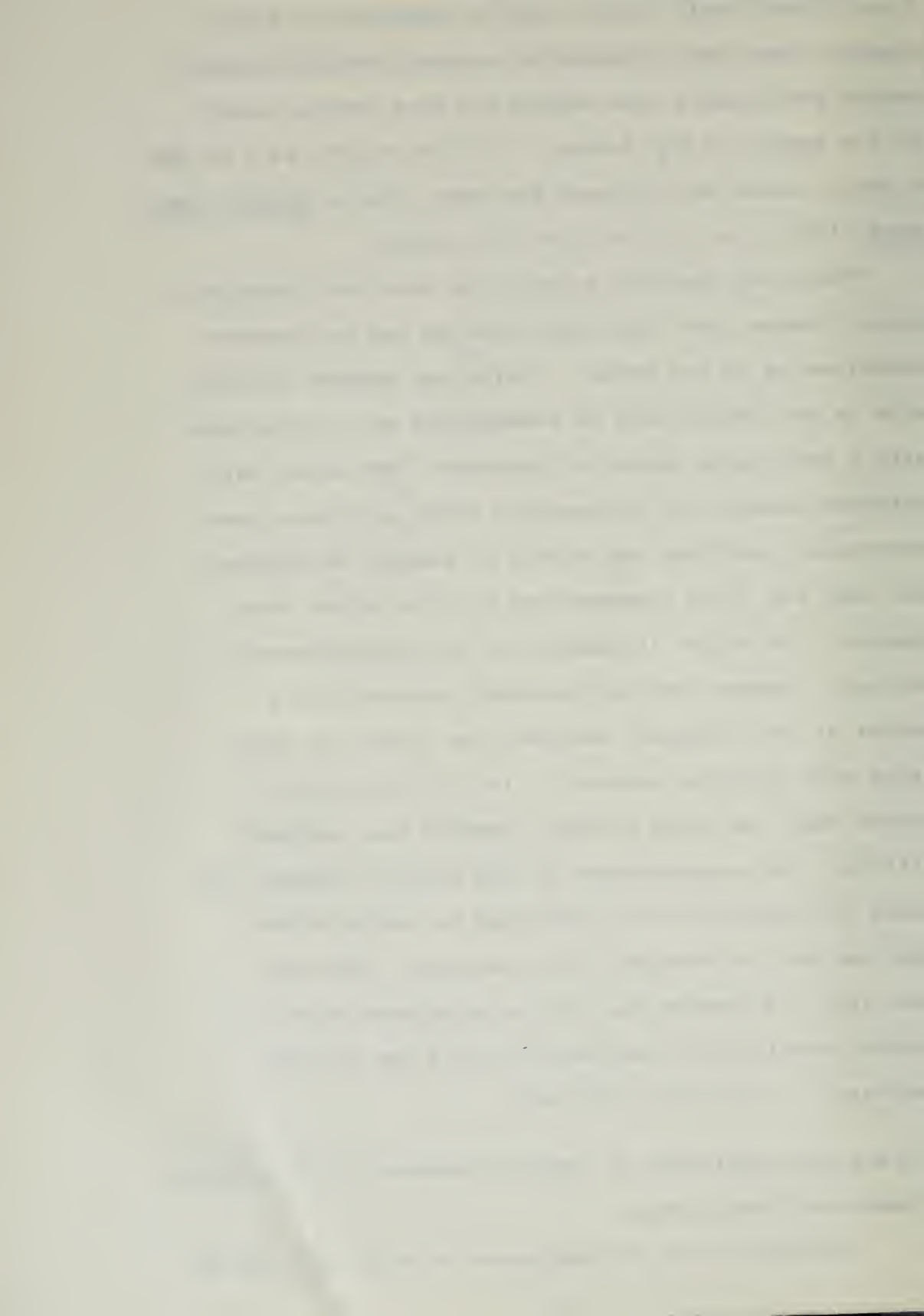
"The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded

a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage." 327 US at 266, 66 S Ct 580. This Court stated and followed the same rule in Brink's Inc. v. Hoyt (1950, C.A. 9) 179 F.2d 355, saying:

"There was abundant evidence to show that there was actual damage, and that being true we can not concern ourselves as to the amount. While the damages recoverable in any action must be susceptible of ascertainment with a reasonable degree of certainty, yet where unliquidated damages are recoverable there is always some uncertainty and they can rarely be exactly determined but they are to be compensatory for the injury done. However, the relief in damages is only approximately perfect. Damages are not rendered uncertain as a matter of law, however, because they cannot be calculated with absolute accuracy. It is also to be observed that one whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by plaintiff is not entitled to complain that they can not be measured with exactness. The mere fact that the damages may not be calculated with absolute certainty or exactness is not a bar to their recovery." 179 F.2d at 360-361.

II. The rules applicable to proof of damages in the present case are liberal ones.

Because of the circumstances of this case and the



questions before the Court on this appeal, the applicable rules, in addition to the one discussed in the foregoing paragraph, are liberal ones.

A. To avoid involuntary dismissal, plaintiff need show only that he has been subjected to some damage as a result of defendant's conduct.

Since the trial court was considering the evidence of plaintiff's damages upon defendant's motion for involuntary dismissal,* plaintiff's evidence of damages must be regarded as true, it need only be determined that there is some credible evidence that plaintiff has suffered some damage as a result of defendant's wrong; the amount of such damage is a proper subject for the jury, upon proper instructions, to determine.

"If nominal damages or damages in any amount are shown, the granting of a nonsuit or a peremptory instruction for defendant is improper...." 25 A, CJS, Damages, §176(2), p. 168.

B. The rule of damages to establish lost profits is a liberal one.

Consistent with the principles set forth in the foregoing sections, it is said that:

*Inasmuch as defendant did not assert the insufficiency of the evidence of damages as a ground for the motion for involuntary dismissal and the order of dismissal does not mention it, we doubt that this issue should have been considered by the trial court, for this Court has held that a motion for directed verdict is the proper motion in a jury case (Kingston v. McGrath, 232 F.2d 495) and that motion, under Rule 50 (a) requires specific statement of the grounds therefore.

"The rule of evidence to establish lost profits, when recoverable, is a liberal one." 25A CJS, Damages, §155, p. 48, citing Western Feed Company v. Heidloff, 230 Ore. 324, 370 P.2d 612, 619.

III. No speculation or conjecture on the part of the jury is required to determine plaintiff's damages herein.

The trial court held, as a matter of law, that there was insufficient evidence to permit the jury to award any damages and that any such award would have to be based on speculation and conjecture. Analysis of the judge's remarks on the evidence of damages shows clearly that he overlooked some relevant parts of the proof.

The judge found the evidence insufficient because there was no showing of prior years' profits -- except 1965 -- and because there was no showing of inventory carryovers. He also found no breakdown of profits by carloads nor any showing of the number of cars not shipped. The court also observed that the lumber market was good in May, bad in October, with a constant falling off.

For the most part, the evidence does not bear out the court's remarks. It is true that only one prior year's operating results and income tax return -- 1965 -- was offered in evidence. However, inventories were clearly shown, from December, 1964 to January, 1967. (P. Ex. 19,20) Profit by carload in 1965 -- if significant -- could be determined by a simple computation, since the record showed that 44 cars were shipped by plaintiff that year (P.Ex. 22), and, of course,

there was no profit per car in 1966 and loss per car would be a meaningless and misleading figure. Similarly, number of cars not shipped would be a matter of pure speculation -- unless based on the 1965 figure.

Moreover, the trial court's remarks concerning the market in 1966 seem to indicate that he overlooked the most significant bit of the expert's testimony, which was to the effect that, over the year as a whole, prices for the species of lumber manufactured by plaintiff were higher in 1966 than in 1965. (Tran. p. 176, l. 21 - p. 177, l.2; p. 162, l.22-27)

Whether the testimony of plaintiff that he had reason to anticipate a better year in 1966 than in 1965, because of better equipment, larger inventory and better market, would support a jury award of lost profits in excess of the 1965 figure may be a close question. But surely, standing uncontradicted, this evidence, together with plaintiff's testimony that his losses in 1966 were due entirely to his inability to ship his lumber, would permit the jury to award him a similar profit. And plaintiff's net loss from operations in 1966 -- \$21,210.46 -- was proved in detail and is a proper item of allowable damage.

It may be, of course, that plaintiff's damages cannot be proved exactly. But the mere fact that it is difficult to arrive at the exact amount of damages where it is shown damages resulted, does not mean that none may be awarded, and it is for the jury to fix the amount. Conley v. Amalgamated Sugar Co. 74 Idaho 416, 423, 263 P.2d 705.

Given the weight and credence it demands on a motion to

dismiss, the evidence herein shows clearly that plaintiff was, in fact, damaged by the wrongful acts of defendant -- to the extent, at least, of his net loss in 1966. Defendant should not, therefore, be permitted to escape liability merely because the determination of the proper award of damages would require the exercise of some judgment on the part of the jury.

Proposition Three -- THE TRIAL COURT ERRED IN REFUSING TO PERMIT PLAINTIFF TO REOPEN HIS CASE TO SUBMIT FURTHER EVIDENCE THE COURT DEEMED ESSENTIAL TO RECOVERY.

Immediately after the trial court had granted defendant's motion for involuntary dismissal, plaintiff moved to reopen his case in order to submit more specific evidence on the issue of damages. The motion was promptly denied. (Tran. p.185, 1. 1 - 8). If the court believed further evidence on the damage issue was necessary, we submit that the motion should have been granted.

I. It is common practice to permit reopening and submission of additional evidence after motion for involuntary dismissal.

With the liberalization of trial practice which has come with the Rules of Civil Procedure, the courts have more and more consistently recognized that law suits should be determined on their merits, rather than upon the skill of counsel. Accordingly, it has become common practice to permit a party to reopen his case to submit additional evidence if he discovers, or the court indicates, that he has omitted some ele-

ment of his proof -- whether through oversight or misconception of the requirements of the law. This practice is especially common after a motion for non-suit, directed verdict, or involuntary dismissal. 53 Am.Jur., Trials, Sec. 123, p. 109. See: Spokane Merchants' Assn. v. Olmstead, 80 Idaho 166, 170, 327 P.2d 385.

II. The trial court should grant a motion to reopen to receive evidence necessary to the proper disposition of the case, especially where no delay or inconvenience will result.

In the exercise of its discretion, the trial court should permit reopening, after a motion for disposal of the case, to receive evidence inadvertently omitted, or evidence which is necessary for the proper disposition of the case or which might affect the court's ruling on the motion to dispose of the case. And this should be done, especially, where reopening will not result in any appreciable delay or inconvenience to the court or opposing counsel. 88 CJS, Trial, § 108, p. 225.

Here plaintiff's motion was made immediately after the court's ruling on the motion for involuntary dismissal -- which was the first opportunity plaintiff's counsel had, since defendant had not raised the issue of the evidence of damages in his motion or argument. No delay of the trial would have been involved; no inconvenience to the court, the jury, or to counsel would have resulted; and, certainly, defendant could not have claimed surprise or prejudice in any other respect.

It was recognized by plaintiff's counsel when the

motion was made, that it was not likely to receive favorable consideration, in view of the court's ruling on other issues which it believed were raised by the motion to dismiss. Accordingly, we respectfully submit that the trial court, in ruling upon the motion, probably dismissed it rather summarily and without serious consideration of its possible merit. If this Court should, therefore, incline to agree with the trial court's position regarding the proof of damages, we earnestly request that the motion to reopen be weighed in the light of the circumstances existing at the time it was made and ruled upon.

CONCLUSION

Plaintiff introduced ample evidence which would have justified a finding by the jury, acting reasonably, that defendant breached its common law and statutory obligations as a common carrier in at least one of a number of ways. The jury could have reasonably found, further, that such breach of duty resulted in defendant's suffering very substantial damages.

The jury should have been permitted to decide these issues.

Another jury, at a new trial, should yet be permitted to decide them.

Respectfully submitted this 14th day of October, 1967.

McFadden & Park

By 

Jerrold E. Park

Attorneys for Appellant
St. Maries, Idaho

APPENDIX TO APPELLANT'S BRIEF

Listing of Exhibits

<u>Number and Description</u>	<u>Page at which</u>		
	<u>Ident.</u>	<u>Offered</u>	<u>Admitted</u>
Plf. Ex. 1 - Letter dated Aug. 9, 1966	13	13	(Rej.) 15
Plf. Ex. 2 - Letter dated Aug. 30, 1966	(Stip) 12	12	12
Plf. Ex. 3 - Letter dated May 25, 1966	(Stip) 12	12	12
Plf. Ex. 4 - Shipment record	(Stip) 33	33	33
Plf. Ex. 5 - Letter dated May 7, 1956	(Stip) 51	51	51
Plf. Ex. 6 - Letter dated Feb. 9, 1955	(Stip) 51	51	51
Plf. Ex. 7 - Letter dated May 16, 1956	(Stip) 51	51	51
Plf. Ex. 8 - Wire dated June 30, 1964	(Stip) 51	51	51
Plf. Ex. 9 - Letter dated July 8, 1964	(Stip) 51	51	51
Plf. Ex.10 - Letter dated Apr. 1, 1966	(Stip) 51	51	51
Plf. Ex.11 - Letter dated Apr. 25, 1966	(Stip) 51	51	51
Plf. Ex.12 - Letter dated May 13, 1966	(Stip) 51	51	51
Plf. Ex.13 - Letter dated Aug. 17, 1966	(Stip) 51	51	51
Plf. Ex.14 - Letter dated Aug. 29, 1966	(Stip) 51	51	51
Plf. Ex.15 - Letter dated June 22, 1966	(Offered by dft.) 84-85	85	85
Plf. Ex.16 - Letter dated Feb. 3, 1955	(Stip) 136	136	136
Plf. Ex.17 - Letter dated Nov. 9, 1955	(Stip) 136	136	136
Plf. Ex.18 - Letter dated Dec. 6, 1945	(Stip) 136	136	136
Plf. Ex.19 - 1965 Federal Income Tax	159	159	159
Plf. Ex.20 - 1966 Federal Income Tax	159	159	159
Plf. Ex.21 - Letter dated Aug. 29, 1966	(Stip) 181	181	181

Proposed Pre-trial Order (Apparently Never Signed nor Filed)

McFADDEN & PARK
St. Maries, Idaho
245-2521

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
NORTHERN DIVISION

V. L. JOHNSON, d/b/a V. L. JOHNSON)	
LUMBER COMPANY,)	
)	
Plaintiff,)	Case No. _____
)	
vs.)	PRE-TRIAL ORDER
)	
CHICAGO, MILWAUKEE, ST. PAUL and)	
PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	
)	
-----)	

There having been no opportunity for pre-trial conference with the Court in the above-entitled matter, and counsel for both parties having conferred pursuant to this Court's order of February 6, 1967, IT IS ORDERED:

I.

This is an action for damages sought by the plaintiff, V. L. Johnson from the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company on the basis of three alternative causes of action set forth in plaintiff's complaint.

Each cause of action alleges that plaintiff was the

owner and operator of a sawmill at Elk River, Idaho and has shipped substantial quantities of lumber over defendant's railroad line; that on or about May 13, 1966, without notice to plaintiff or lawful authority, defendant discontinued freight service between Elk River and Bovill, which service had not been restored on September 27, 1966; that plaintiff had made frequent demands for service which were ignored by defendant; that defendant's failure to provide service to plaintiff resulted in damages to plaintiff from loss of profits, deterioration of logs and timber owned by plaintiff and additional expenses incurred by plaintiff.

Plaintiff's first cause of action alleges liability of defendant for violation of duties imposed upon common carriers by the Idaho Constitution and by Idaho and federal statutes.

Plaintiff's second cause of action alleges liability of defendant for negligence in the maintenance of its railway line, resulting in a tunnel cave-in and the suspension of service, all to plaintiff's damage.

Plaintiff's third cause of action alleges that the freight service discontinued on May 13, 1966 could have been restored within thirty days thereafter, but that defendant negligently and in violation of its statutory duty failed to make reasonable efforts to repair the tunnel and restore service, as a result of which freight service had not yet been restored to the date of the complaint, September 27, 1966, all to plaintiff's damage.

Defendant's answer denies many of the allegations of plaintiff's complaint, as hereinafter set forth.

II.

Federal jurisdiction was invoked by defendant by petition for removal from state court upon the ground of diversity of citizenship, there being in excess of \$10,000 in controversy in this action, and plaintiff being a citizen of Idaho and defendant corporation being a citizen of Wisconsin by reason of incorporation in said state and by having its principle place of business therein.

III.

The following facts are admitted and require no proof:

(a) The jurisdictional facts set forth in paragraph II above;

(b) That plaintiff is an individual doing business under the firm name of V. L. Johnson Lumber Company at Elk River, Idaho;

(c) That defendant is a railroad corporation doing business in the State of Idaho as a common carrier of freight;

(d) That since the year 1963 plaintiff has operated a sawmill in Elk River, Idaho and has regularly shipped substantial quantities of lumber in carload lots over defendant's railroad line between Elk River, Idaho and its connection with defendant's main line at St. Maries, Idaho;

(e) That virtually all of plaintiff's shipments of lumber referred to above have been destined for points outside the State of Idaho and have hence constituted shipments in Interstate Commerce.

(f) That on or about April 12, 1966 a partial

cave-in of a tunnel on defendant's railroad line between Bovill and Elk River, Idaho resulted in a temporary suspension of rail service to and from Elk River, Idaho, which suspension continued until April 15, 1966.

(g) That on May 12, 1966, service over said line was again suspended, which suspension continued until October 15, 1966.

(h) That no orders were obtained by defendant from the Idaho Public Utilities Commission or the Interstate Commerce Commission prior to such suspension of service, or at any time.

(i) That maintenance and repair work in the tunnel in question, from May 13, 1961 through May 13, 1966 consisted of the following:

1962 - Renewal of frames and brace posts - intermittently

1963 - Renewal of frames and brace posts - intermittently

1964 - None

1965 - None

1966 - Renewal of frames and brace posts
April 18 to 20, May 7 to 13

(j) For several years prior to the suspension of service involved herein, the condition of the tunnel had been questionable because of shifting of earth in the hill and rotting and cracking of timber bracing due to age and earth shift, and defendant had been considering replacing the tunnel with a cut.

(k) Defendant entered into a contract with Morrison - Knudsen Company to replace the tunnel with a cut on August 17, 1966, and said company commenced such work on

August 24, completing it on October 12, 1966.

IV.

Neither party asserts any reservations with respect to the facts cited in paragraph III above.

V.

The following issues of fact, and no others known to plaintiff, remain to be litigated upon the trial:

(a) Whether the discontinuance of freight service between Elk River and Bovill, Idaho resulted from an Act of God.

(b) Whether defendant failed to maintain its facilities so as to promote the safety, health, comfort and convenience of its patrons, employees and the public, and so as to provide adequate, efficient, just and reasonable service, as required by Idaho Code, Sections 61-302, 62-402 and 62-403.

(c) Whether such discontinuance could have been avoided by defendant through the exercise of ordinary care in the maintenance of the tunnel.

(d) Whether plaintiff made demands upon defendant for service from Elk River, and if so, whether defendant failed to honor such demands.

(e) Whether defendant advised plaintiff during May or June of 1966 that service on defendant's line would be restored on or before July 15th, or some other date prior to October 15, 1966.

(f) Whether defendant, by the exercise of ordinary care, could have restored service prior to October 15, 1966 and, if so, on what date prior thereto.

(g) Whether and to what extent plaintiff suf-

ferred financial damage as a direct result of defendant's failure to provide freight service from May 12, 1966 to October 15, 1966, or -- in the alternative -- its failure to restore freight service as promptly as it might have done by the exercise of ordinary care.

(h) Whether and to what extent plaintiff might have reduced such damages by reasonable efforts to make other shipping arrangements.

VI.

Plaintiff expects to offer the following exhibits at the trial, with respect to which defendant has made no admissions:

(a) Photographs of the area in which the cave-in occurred.

(b) Plaintiff's 1965 and 1966 income tax returns.

(c) Compilations prepared by plaintiff's bookkeeper from plaintiff's records showing his investment in the sawmill at Elk River and comparisons of 1966 operating results with results in prior years.

(d) Letter of plaintiff's counsel to defendant, dated August 9, 1966.

(e) Defendant's reply to said letter dated August 30, 1966.

VII.

The witnesses known to plaintiff and expected to testify at the trial are as follows:

V. L. Johnson, plaintiff -- on all factual issues.

Gilbert Dahl, Elk River, Idaho (operator of small

cedar mill) -- on issues of suspension of service and statements of defendant with respect to restoration of service and reasons for delay in restoring service.

J. Emory Hall, Lewiston, Idaho (contractor) -- Expert witness on the issue of the time required to restore service.

Joe Holland, Bovill, Idaho (defendant's former station agent at Bovill) -- on issues of plaintiff's efforts to obtain freight service and advice given him by defendant as to restoration of service.

E. J. Sullivan, Spokane, Washington (defendant's freight traffic superintendent) -- on the issue of plaintiff's efforts to obtain freight service and advice given him by defendant as to restoration of service.

T. M. Pajari, Tacoma, Washington (defendant's division engineer) -- on issue of defendant's maintenance of the tunnel in question and efforts to restore service.

Bernadine Peters, St. Maries, Idaho (plaintiff's bookkeeper) -- on issue of plaintiff's damages.

Ed Chopot, Spokane, Washington -- expert witness on conditions in the lumber market throughout the 1966 season as related to the issue of plaintiff's damages.

VIII.

The following issues of law, and no others known to plaintiff, remain to be litigated upon the trial:

(a) Whether defendant had a duty to plaintiff to provide freight service and, if so, whether defendant breached such duty by suspending freight service.

(b) If defendant breached any such duty to plaintiff, what is the measure of plaintiff's damages?

(c) If defendant did not breach any duty to plaintiff by suspension of service alone, what duty, if any, did defendant owe plaintiff with respect to the proper maintenance of its equipment and railway line?

(d) Whether defendant breached any such duty owed by it to plaintiff.

(e) If such breach of duty is shown, what is the measure of plaintiff's damages resulting therefrom?

(f) Whether defendant owed any duty to plaintiff to restore service promptly after suspension and, if so, whether defendant breached such duty.

(g) If such duty and breach are shown, what is the measure of plaintiff's damages therefrom?

(h) It having been established that defendant is a common carrier and that freight service between Elk River and Bovill was suspended from May 12, 1966 to October 15, 1966, which party has the burden of proof on each of the foregoing issues?

(i) Whether plaintiff, if successful in establishing defendant's liability for damages, is entitled to attorneys fees.

IX.

The foregoing admissions having been made by the parties and the plaintiff having specified the foregoing issues of fact and law remaining to be litigated, this order shall

supersede the pleadings and govern the course of the trial of this cause, except to the extent modified prior to the trial upon application of either party.

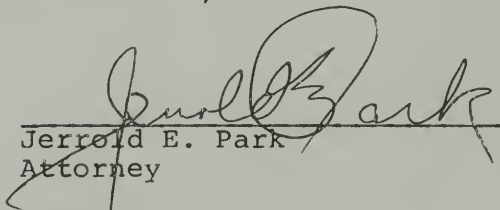
DATED this _____ day of March, 1967.

United States District Judge

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this 11th day of October, 1967.



Jerrold E. Park
Attorney

McFADDEN & PARK
St. Maries, Idaho
Attorneys for Appellant

